

FEDERAL ELECTION COMMISSION
MATTER UNDER REVIEW 5835
DEMOCRATIC CONGRESSIONAL CAMPAIGN COMMITTEE
PROBABLE CAUSE HEARING

Tuesday, October 28, 2008

**999 E Street, N.W.
9th Floor Meeting Room
Washington, D.C.**

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COMMISSION MEMBERS:

DONALD F. McGAHN II, Chairman

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CYNTHIA L. BAUERLY, Commissioner

MATTHEW S. PETERSEN, Commissioner

ELLEN L. WEINTRAUB, Commissioner

CAROLINE C. HUNTER, Commissioner

ALSO PRESENT:

THOMASENIA P. DUNCAN, General Counsel

JOSEPH STOLTZ, Acting Staff Director

PRESENTING ATTORNEY:

BRIAN SVOBODA, ESQUIRE

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P R O C E E D I N G S

CHAIRMAN MCGAHN: We're here for a probable cause hearing on MUR 5385 regarding the DCCC. That's short for the Democratic Congressional Campaign Committee. Before we begin, I'd like to give a little overview of the procedures, so we all know what we're going to do here, because it's still a rather new program and some have come in and been a little unsure, and I want to make sure we know the ground rules.

Under our policy statement, which is a public document, respondents will have 20 minutes for their prepared statement. You may divide this time between an opening statement and a closing statement. We'd like you to inform us how much you want to leave at the end, kind of for rebuttal. We do have the lights -- yellow is five minute warning, red means time's up, but unlike the U.S. Supremes, I don't think we're going to just disappear behind a curtain when you're in mid-sentence.

After you've made your opening statement, I recognize various Commissioners ask questions. My preference is the Commissioners just do it quasi-judicial and not the

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1 sort of rolling comments we do in rulemaking. So if people
2 have questions, fire away. And then once that is done,
3 under our policy statement, general counsel and the staff
4 director may also ask questions upon being recognized by the
5 Chair. And those questions, not surprisingly, are not time-
6 limited. So we can talk as long as we want to talk. And
7 under a policy statement, we have an hour-and-a-half blocked
8 in for this. If it doesn't take that long, then we don't
9 take that long. So we -- if we get through this, we get
10 through this.

11 To frame-up the issues, the Commission has
12 previously found "Reason to Believe" that an unknown
13 respondent violated 2 U.S.C.441d by allegedly failing to
14 include disclaimers on two sets of phone banks. After an
15 investigation, it was revealed that the DCCC in some form or
16 another paid Quest Global Research, Incorporated, to conduct
17 three sets of what's alleged to be phone banks. Based on
18 that information, the Commission substituted the DCCC and
19 Boswell for Congress in place of the, quote, unknown
20 responded, unquote.

21 After some time passed, the general counsel on a

1 brief dated July 1, 2008, recommended that the Commission
2 find probable cause to believe that the DCCC violated
3 2 U.S.C.441d by failing to include disclaimers in its
4 supposed telephone banks. Respondents submitted a reply
5 brief on August 11, 2008, and requested a hearing, which was
6 granted on August 20th and here we are. That's where we
7 are, so take it away.

8 MR. SVOBODA: Well, thank you, Mr. Chairman.
9 Thank you members of the Commission. I'm Brian Svoboda from
10 Perkins Coie and I'm here with my colleague Kate Cain, an
11 associate in our firm.

12 I thank you first for giving me the opportunity to
13 be here without interruption by cell or by Blackberry a week
14 before the election, which is an unwelcome -- or an unusual
15 treat. And I'm also grateful to be here, because the issue
16 before the Commission today is a very important issue. The
17 Commission is being asked to find for the first time that a
18 bona fide scientific public opinion research poll is subject
19 to the disclaimer requirements of the act. Without having
20 provided specific notice or comment toward that conclusion
21 without having giving any real inkling in its public

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1 materials or its other pronouncements that this is indeed
2 the case. And we would respectfully submit to the
3 Commission that it should not find that both 441d or 110.11
4 applies to a bona fide scientific poll. The statute and the
5 regulations on their face govern only advertising, and a
6 poll by definition is not a form of advertising, it is
7 designed and used to elicit information, not to disseminate
8 information. It is not the sort of communication that
9 Congress intended to cover with 441d and indeed that the
10 statute is supposed to cover. And for these reasons, and
11 also for the consequences that a finding would have for the
12 entire regulated political community, we would ask the
13 Commission not to find probable cause in this matter.

14 Now, I talk about bona fide scientific research
15 polls and an obvious question that may occur to you is what
16 exactly does that mean, so let me talk a moment about the
17 polls in this matter and how they relate to the other types
18 of communications that political organizations sponsor.
19 Political committees, and parties, and candidates
20 communicate in a number of different ways by phone. From
21 time to time, they'll do what people in the industry would

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1 call persuasion calls and these are messages being sent to
2 voters to try to influence their voting behavior. They tend
3 to be sent in mass quantities to influence a significant
4 number of people at a relatively low cost. From time to
5 time, parties and candidates will do what's called ID calls.
6 You're collecting individualized personal information from
7 voters about their preferences, so that you can put it into
8 a database and use it later to mobilize the voting decisions
9 and turn them out on Election Day. There's a lot of that
10 going on this week. I can guarantee you.

11 What we're talking about here today, and what's at
12 issue in this matter, is something completely separate and
13 apart from these types of communications, we're talking
14 about bona fide scientific public opinion research polls.
15 These are the sorts of polls that Dick Worthlan did for
16 Ronald Reagan in 1980 and 1984.

17 These are the sorts of polls that Matthew Dow did
18 for President Bush in 2000 and 2004. These are the sorts of
19 polls that Mark Mellman did for John Kerry in 2004. This is
20 where somebody in the political consulting industry,
21 typically with a social science background in some degree of

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1 higher education puts together a questionnaire, at least 10
2 minutes in length, often longer, that is designed to elicit
3 information from a random sampling of voters, not collecting
4 individualized information. They don't have any interest in
5 knowing who these people are, particularly once they've
6 collected the results and used them, for purposes of
7 eliciting information from them and getting, if you will, a
8 snapshot of voter attitudes and voter responses to issues
9 pertaining to the election. To know, for example, who is
10 likely to vote for which candidate, to know, for example,
11 what issues are likely to move which voters, to know, for
12 example, how different issues might resonate with different
13 subgroups of voters.

14 So you'll put together a questionnaire. You will
15 distribute it over a period of some nights to a sample size
16 that can run anywhere from 300 to 500 -- or upwards of 500
17 of voters -- and you'll take the information and you'll
18 aggregate it and produce what pollsters call top lines,
19 which are the results showing in basic what was found and
20 also cross-tabular results, which is intended to show how
21 these results vary among different demographic groups or

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1 people who responded in different ways to the poll. And all
2 of this is taken by the campaigns or by the party to
3 influence their strategic decision-making.

4 They're not trying to influence the voter's
5 behavior on the call, they don't want to influence the
6 voter's behavior on the call. They want to know what the
7 voter genuinely thinks so that they can consider that in
8 their strategic decision-making. So if, for example, they
9 called my wife tonight at home and asked her if she was
10 going to vote for Barack Obama and she told them, No, I'm
11 not going to vote for Barack Obama, they don't want her --
12 that they want her to tell the truth. They don't want to
13 tell her what she might think they want to hear or to change
14 her answer. They want to know genuinely what they think, so
15 that they can consider it in a statistical analysis of voter
16 behavior.

17 And so the communication itself is not intended to
18 influence voter behavior, it is used to influence the
19 strategic decision-making that later will influence voter
20 behavior. So that's what a bona fide scientific poll is and
21 that's how it's different from the other types of phone

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1 communications that political committees sponsor. It's the
2 sort of thing that every major presidential campaign, every
3 major Senate campaign, every major House campaign sponsors.
4 They are ubiquitous in the political community and they have
5 been for years, and years, and years.

6 So how do we know that the polls in this matter
7 fall into this category? I would commend the Commission to
8 look -- or the Commissioners to actually look at the
9 documents that have been produced in the course of this
10 investigation, and if you follow politics closely, you'll
11 see that these polls are exactly what they were. How do we
12 know they were bona fide polls?

13 First off, they were paid for or they were
14 Commissioned by a reputable democratic opinion research
15 firm, Hans, Looney, List, which provides these sorts of
16 services for democratic candidates across the board.

17 Second, if you look at the questionnaire, you'll
18 see if falls into this category. It runs upward of 10
19 minutes in length, it seeks demographic information, it
20 seeks information, for example, about head to heads in the
21 presidential race, and it tests voter responses on

1 particular issues. You can tell this by the quantity of the
2 calls.

3 If I wanted, for example, to tell voters in Iowa
4 in 2004 that Stan Thompson had not supported funding to hunt
5 down Osama Bin Laden, which was one of the questions in one
6 of the polls, they were testing an issue to see if it would
7 work well in the campaign, I wouldn't do it in a 10 minute
8 questionnaire to 800 Iowans for which I paid \$10,000.00, I'd
9 do it in a one minute robo-call to 100,000 Iowans for which
10 I could pay \$10,000.00. I would communicate with a much
11 wider universe of people at a much more efficient way and a
12 much cheaper way. And that's where I might recommend that
13 the Commission take a look at the affidavit that we
14 submitted on behalf of Al Quinlan, a democratic pollster,
15 talking about the difference between the bona fide polls
16 that are conducted for survey research purposes and push
17 polls and other types of phone communications. One of the
18 points that Mr. Quinlan makes is that bona fide survey
19 research polls, because of the length of time and the
20 expense, are just not an efficient means to communicate
21 information positive or negative. They're not used that way

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1 and they just don't fit for that sort of purpose.

2 So those are the polls in this matter. One was
3 commenced on October 12th. It went to a sample size of 550
4 respondents. It was paid for by the DCCC as a 441d expense
5 on behalf of Leonard Boswell. One was commenced on October
6 21 and had a sample size of 800 voters and, again, was paid
7 for by the DCCC as a 441AD expense for Boswell.

8 So the question before the Commission today is,
9 does this type of poll, does this type of communication,
10 require a disclaimer and should it require a disclaimer?
11 And the answer to that, we would submit, is found in the
12 statute. And the answer to that is no. The statute
13 itself, 441d, and the regulation that implements it, 11 CFR
14 110.11, on their face are limited only to advertising. Only
15 to advertising.

16 And, in fact, if you look at the legislative
17 history from McCain-Feingold, which most recently amended
18 the statute, and you look at the summary of the legislation,
19 which the sponsors offered, you will see the section, the
20 revised 441d, designed as standards of clarity for election-
21 related advertising. And a poll, simply put, is not

1 advertising. It's not intended to disseminate information,
2 it's intended to elicit information.

3 So how did we get to this place? How are we
4 presented here with a proposed finding that, indeed, the
5 poll should have carried a disclaimer? Well, part of the
6 problem is that the Commission's disclaimer regulation,
7 110.11, borrows the phrase public communication from Section
8 431(22). And public communication, when Congress enacted
9 that term in BCRA, was written without the disclaimer
10 requirement in mind. It doesn't occur in the disclaimer
11 statute. Congress wrote it to implement the soft money
12 spending provisions that apply to state and local parties
13 and that apply to state and local candidates. So it was
14 trying to capture through that term a wide universe of
15 communications.

16 They knew, for example, that a state party might
17 run a phone bank urging people to go out to the hot dog feed
18 for candidate X. And if candidate X was a federal
19 candidate, Congress presumably wanted that communication to
20 be paid for with federal money. If it was promoting
21 candidate X. And so there was great importance put by the

1 sponsors of BCRA and by Congress on trying to have a
2 definition of public communication that was sufficiently
3 large, that it would not allow parties to evade the soft
4 money spending band.

5 So the Commission is tasked with writing rules to
6 implement the disclaimer requirement of 441d and it seizes
7 on the definition of public communication as a useful proxy,
8 if you will, to try to identify the sorts of communications
9 that are captured by the disclaimer statute. The definition
10 of public communication has served over the years as kind of
11 like a Swiss Army knife for the Commission, useful in a
12 number of different contexts other than the one in which it
13 was originally written, for example, in the coordination
14 rules or in the allocation rules for non-party pacts. But
15 the problem that you have is that the disclaimer
16 requirement, on its face, is limited solely to advertising,
17 so to simply say that when you communicate with anybody by
18 phone to more than 500 people, that it's advertising, well,
19 you can see how in a matter like this you hit a blind spot
20 where the regulation and the statute don't quite meet. It's
21 rather like having a regulation that leads you to conclude

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1 that all four-legged animals with tails are dogs. Well,
2 they're not. I mean there's some that aren't.

3 And logic leads one to conclude that there are
4 some types of communications that may be distributed by
5 phone and indeed may be distributed by more than 500 people,
6 but at bottom they're not advertising, which is all that the
7 statute regulates.

8 And so that's how, I think, we got to this place.
9 And it's important to know as you see this process that
10 Congress evidenced no intent that the disclaimer
11 requirements should capture public opinion polls. Believe
12 me, this is one of the things that members of Congress know
13 about. If there's anything they know about, it's the polls
14 that they read and the polls that are conducted on their
15 behalf. And if you had asked any of them whether a
16 disclaimer would have to be put on their polls, I think it's
17 a safe bet that a vast majority of them would have been
18 aghast. There's nothing in the legislative history to
19 suggest that that's what Congress intended to do. There's
20 nothing in the regulatory history, when the Commission wrote
21 110.11 in 2002, to suggest that the disclaimer requirements

1 applied to bona fide public opinion polls. There was some
2 back and forth in the rulemaking as to whether it can apply
3 to phone calls at all.

4 And there were two comments, one submitted on
5 behalf of the NRCC and one submitted by Perkins Coie
6 suggesting at the time that it was unsafe for the Commission
7 to conclude that it could be. But nonetheless, whether 441d
8 applies to some universe of phone calls or not, there's
9 nothing in the regulatory history to suggest that it was
10 intended to apply to a bona fide scientific poll. And you
11 can search the campaign guides, the brochures, the
12 Commission's other informal guidance, presumably your
13 education training seminars, in vain for anything where the
14 Commission has told the regulated community that a bona fide
15 poll has to have a disclaimer.

16 So all of this leads one to conclude -- leads us
17 to conclude quite strongly that 441d and 110.11 do not
18 capture this sort of communication, were not intended to
19 capture this sort of communication, and, indeed, can't be
20 applied by the face of the statute to this sort of
21 communication.

1 So what happens if the Commission nonetheless does
2 apply it to this sort of communication? What's the
3 consequences of a probable cause finding here? The first
4 consequence -- and this addresses a question that I myself
5 had in the course of lawyering this matter -- is how would
6 it affect the data that political committees collect in
7 order to conduct their business? And the answer is it would
8 -- to be blunt, it would screw up the data. And the reason
9 for that is this. You might very well have a poll with a 10
10 minute questionnaire and a disclaimer at the end, so when
11 you found out what Svoboda thinks about the presidential
12 race and you tell him at the end it's paid for by McCain-
13 Palin and he can't take it back, he can't change his
14 answers.

15 So you've got Svoboda's response, but the problem
16 is -- particularly in the age of the Internet -- you may
17 have Svoboda then going and posting to the Daily Coast or to
18 RedState.org saying, hey, I was called by Obama for America
19 and they asked me this or I was called by McCain-Palin and
20 they asked me this, this, this, and this. They asked me
21 these five embarrassing questions about John McCain, they

1 asked me these five embarrassing questions about Barack
2 Obama. I can't believe they asked me these questions and
3 that's going to have the effect over a poll that's conducted
4 over multiple nights, as polls typically are, of screwing up
5 the subsequent responses.

6 The people who get the calls the next day or the
7 day after may well have read or be aware that a poll's being
8 conducted, know exactly who is conducting it, and they may
9 have a desire to lie to the pollster, they may, without
10 wanting to lie -- and this is something that Al Quinlan
11 talks about in his affidavit -- be nonetheless affected in
12 how they're providing their answers. They think, for
13 example, they're telling the pollster what they want to hear
14 because they know who the pollster is, they think they're
15 being clever or ingenious in answering the questions, so
16 what you have is a situation where political committees are
17 going to find it much, much harder to reliably collect
18 survey data because of the way information spreads. This is
19 a problem that actually now, with the advent of the
20 Internet, is starting to happen with polling. It is a
21 problem that the Commission would make triply or quadruply

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1 worse by requiring polls to carry a disclaimer.

2 One last point that I want to make sure that the
3 Commission's aware of is that the sample sizes in this poll
4 were 550 and 800 respondents respectively, according to the
5 general counsel's analysis. So one might be led to believe
6 that because many polls involve smaller sample sizes, sample
7 sizes of 300 or 400 respondents, that this is actually not
8 going to capture the bulk of polls that political committees
9 conduct. And the answer is quite the contrary. As Al
10 Quinlan talks about in his affidavit, you have to call many,
11 many more people than that 550 or 800 people to get a
12 significant number of respondents. And so you're going to
13 live in a world where virtually every poll, that every
14 campaign, and every party conducts is going to be subject to
15 the disclaimer requirement.

16 So the Commission really is on the verge here of
17 reaching a consequence that -- or reaching an outcome that
18 will have huge consequences for the entire political
19 community and will completely change the way a significant
20 part of American campaigning is conducted, all without
21 benefit of notice and all without benefit of comment.

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1 And so this is why we would respectfully submit
2 that the Commission should not find probable cause in this
3 matter, that the Commission should find, as the statute says
4 and as the regulation says, that they extend only to
5 advertising and that the polls in this instance, indeed, are
6 not advertising and are not communications that can be
7 covered by the statute or the regulations.

8 I thank the Commission and I welcome your
9 questions.

10 CHAIRMAN MCGAHN: Thank you. Let me start --
11 first, I don't think there's any issue that these are polls,
12 probable cause recommendation briefs, first sentence, and
13 other statement of facts DCCC are to polling and voter
14 identification company. Anzalone -- Anzalone -- I don't
15 know if it's Anzalone or Anzalone -- Lists Research and to
16 conduct two telephone polls in October 2004. So I don't
17 have any issue that these are actually polls. And I'll have
18 some questions later about what that means under the regs,
19 but I'm curious if you can help me understand the procedural
20 history of this case. There was an RTB finding long before
21 your client was involved and then, as I understand it, your

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1 client was put in as a respondent post-RTB. Could you help
2 me understand that? Why are you here?

3 MR. SVOBODA: Well, from the DCCC's perspective,
4 Mr. Chairman, what happened was there was apparently an
5 investigation involving these polls for reasons that haven't
6 been disclosed to the DCCC, that resulted in discovery by
7 the Commission and a conclusion by the general counsel that
8 the DCCC has paid for the polls. And at that point, the
9 Commission found "Reason to Believe" against the DCCC

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And this occurred, if
memory serves, I believe on December 17 of 2007.

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And so at that point, the DCCC, which before then
had not been notified of any complaint, had not been given
the opportunity to respond to any complaint. The DCCC
responded to the RTB finding, we asked the Commission to
reconsider the RTB finding, we provided the Commission and
the general counsel with a brief explaining why the RTB
finding was not reached properly. And then at that point,
of course, the Commission was on hiatus and so we heard

1 nothing until, I believe, before the full complement of
2 Commissioners had been appointed when the general counsel
3 declared its intention to recommend a finding of probable
4 cause in the matter. And so at that point, we provided the
5 Commission -- I believe this was in August of this year --
6 we provided the Commission with a letter explaining why we
7 disagreed with the probable cause recommendation and
8 providing the Commissioners with a road map, if you will, of
9 what had happened previously -- and also provided two
10 Commissioners a copy of the brief that we had sent in
11 February, so the Commissioners were aware of the legal
12 issues that we had raised in response to the RTB finding.
13 So that, so far as we know, is why we're here.

14 CHAIRMAN MCGAHN: Thank you. Just to clarify, you
15 were notified by the counsel that they were going to
16 recommend probable cause, when did that occur?

17 MR. SVOBODA: That was, I believe, in July of this
18 year. July 1.

19 CHAIRMAN MCGAHN: Okay. Could you give me a
20 little sense of the history -- more -- I guess broadly
21 telephones -- telephones, the act, and you. The need for

1 disclaimers, prior rulemaking efforts that's actually in the
2 statute versus the (inaudible) and the rulemaking post VICRA
3 as to how we ended up with a legal theory that polls require
4 disclaimers? Give a history lesson for us. Some of us are
5 new here.

6 MR. SVOBODA: Sure. The best first way to take a
7 cut at this is to divide the world into pre-BCRA and post-
8 BCRA. Pre-BCRA, the disclaimer statutes applied only to
9 express advocacy communications and only to communications
10 that solicited money. That's what, for example, the
11 survival education fund case was about. And there was
12 dispute among the Commission --

13 CHAIRMAN MCGAHN: That case was about disclaimers?

14 MR. SVOBODA: Correct.

15 CHAIRMAN MCGAHN: Thank you.

16 MR. SVOBODA: Correct. And there was dispute with
17 the Commission over whether the disclaimer statute could
18 apply to phone calls at all. And there was a rulemaking
19 which occurred in the Commission, I believe in the early
20 1990s, when the Commission deadlocked on the question of
21 whether the disclaimer requirement could be applied to phone

1 calls at all. So pre-BCRA, the working assumption among the
2 regulated community was that phone calls of whatever stripe,
3 whether it was a poll, whether it was a robo-call, whether
4 it was a persuasion call, whether it was an ID call, did not
5 require a disclaimer. So then Congress passes BCRA in 2002.

6 CHAIRMAN MCGAHN: Can I just jump in? Was it your
7 sense or -- to the extent you can opine on the sense of the
8 so-called regulated community -- after that deadlocked
9 rulemaking, the law was clear you didn't need disclaimers on
10 phones?

11 MR. SVOBODA: That's correct. That's the way I
12 would have advised a client at the time and I believe that
13 is correct.

14 CHAIRMAN MCGAHN: Thank you.

15 MR. SVOBODA: So Congress passes BCRA in 2002 and
16 it does a number of things. The first is it crafts a
17 definition of public communication and telephone bank for
18 the purpose of implementing the soft money spending
19 restrictions that were placed on state and local parties.
20 And, indeed, if you look at the legislative history, the
21 section by section analysis that Senator Feingold introduced

1 for BCRA before its final passage, you'll see that the
2 definitions of public communication and telephone bank are
3 described as being for the purpose of implementing the soft
4 money restrictions. No sense that they had any salience or
5 relevance to the disclaimer requirements, it was all about
6 making sure that the state parties and the local parties and
7 local candidates were spending hard money to affect federal
8 elections.

9 So you had a definition of public communication,
10 which included so-called telephone banks, which were defined
11 as phone calls reaching more than 500 people during a 30-day
12 period. And here it's important to note phone bank is
13 actually a term of art in the political professional
14 community. That means something different than the sorts of
15 polls that John Anzalone would have conducted or that Matt
16 Dow would have conducted. When a political operative thinks
17 of a phone bank, they think of either hiring a bunch of
18 telemarketers to distribute, you know, an advocacy
19 communication to someone or they think of a campaign getting
20 bunches of fresh-faced volunteers into a room with 30 phones
21 and feeding them pizza while they call voters and try to

1 identify supporters or people who aren't supporting them. I
2 mean that's what phone bank means in the political world and
3 plainly that's what Congress was thinking of when they wrote
4 McCain-Feingold, because they knew that state and local
5 parties did this sort of thing to support their candidates
6 and they wanted it paid for with hard money, just as they
7 wanted GOTB paid with hard money. So that's what Congress
8 did with public communications and phone banks.

9 At the same time, Congress amends the disclaimer
10 statute and it clearly broadened the disclaimer statute,
11 because it wanted it to reach beyond express advocacy
12 communications. It wanted it, for example, to cover issue
13 ads, electioneering communications that covered candidates,
14 because, bear in mind, one of the big purposes of McCain-
15 Feingold was to try to take a whole spew of activity that
16 was being conducted outside the campaign finance laws, issue
17 ads being sponsored by parties or issue ads being sponsored
18 by non-party organizations and bring it in and regulate it.
19 ... So the disclaimer statute was expanded insofar as
20 it could cover more than express advocacy, more than
21 solicitations, but it still remained tethered to a

1 definition of general public political advertising.

2 Communications still had to be a form of advertising to be
3 subject to the disclaimer requirement.

4 So then in July of 2002, the Commission had to
5 write regulations to implement the disclaimer requirements.
6 Actually, I'm sorry, it wasn't July, it was somewhat later
7 than that. I believe the rules were published in September
8 or October of 2002. And the Commission, at that point, saw
9 the definition of public communication in the state and
10 local party-funding context and thought and proposed that it
11 might be useful for defining what would be covered by the
12 disclaimer regulation. In other words, it said why don't we
13 just simply say that disclaimers are required for public
14 communications that are paid for by political committees?
15 Viewing public communications as being a useful proxy, if
16 you will, for conducting advertising.

17 Now, there was a problem with that in terms of
18 statutory analysis. It was a problem that Cooney surfaced
19 in his comments on the rulemaking. It was a problem, also,
20 that the NRCC surfaced in its comments on the rulemaking and
21 the problem was this. If you look at 431(22) and the

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1 definition of public communication, and you look at 441d,
2 the first talks about telephone banks and the second
3 doesn't. They are otherwise almost exactly the same, but
4 the definition of public communication talks about telephone
5 banks and 441d excludes it.

6 Now, the Commission passed this in the rulemaking
7 by saying that the statutes were virtually identical, but
8 virtually identical is kind of a nice way of saying they're
9 not exactly the same. And we can't simply assume that
10 Congress screwed up as a matter of law, we have to assume
11 that Congress acted purposefully under standard principles
12 of administrative law and statutory interpretation. And
13 that gave rise to the comment that we made, and the NRCC
14 made, which is that there was danger in treating the
15 statutes as equivalent. And that has not proved to be --
16 that did not prove to be a problem as a practical matter for
17 some period, because the fact of the matter is the bulk of
18 public communications do involve some form of advertising,
19 but it first popped up as a problem in a matter that the
20 Commission took up roughly a year ago involving David
21 Vitter's campaign.

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1 David Vitter ran for Senate in Louisiana in, I
2 believe, 2004 and David Vitter sponsored two sets of calls.
3 One was a universe of 400,000 advocacy calls telling people
4 to vote for him, that his committee had paid for, and they
5 didn't have a disclaimer. The second was what seemed to be
6 roughly 90,000 peer ID calls. A simple script saying who
7 are you going to vote for in the Senate election and
8 collecting individualized information and putting it into
9 the database. And the Commission found on those facts and
10 found probable cause that the Vitter campaign should have
11 included a disclaimer on those calls. And it extracted a
12 conciliation agreement from Vitter where he agreed to settle
13 the matter.

14 Now, my view of the Vitter matter is that the
15 Commission got it half right and half wrong. On the first
16 universe of calls, the persuasion calls, I see a strong
17 argument that they were a form of advertising under the
18 statute and the regulation. He was communicating with
19 400,000 people and telling them to vote for him. But on the
20 second universe of calls, the peer ID's, that's a much
21 harder call for the Commission to sustain, had it chose to

1 enforce against him in court, in my view.

2 I don't have the benefit of knowing whether the
3 Commission would have proceeded against Vitter were it not
4 for that first universe of calls, but I think there's reason
5 to doubt that they would have or should have. It would have
6 been a difficult conclusion to sustain, I think, in court.

7 But that leads us to our matter, which is, you
8 know, of a type different from all of this. Where for the
9 first time the Commission's being asked to assume that these
10 requirements apply to actual scientific polls, the types of
11 polls that every committee conducts.

12 So, Mr. Chairman, I don't know if that's --

13 CHAIRMAN MCGAHN: One follow-up. Are we safe in
14 either assuming or deferring, depending on how you want to
15 view it, to Congress, that they understood the distinctions
16 between phone banks and polls and a flip-side, voter ID
17 versus advocacy calls and that kind of thing? It is kind of
18 the argument that the government made in the McConnell case;
19 right? Defer to Congress, they're the political experts?
20 Wouldn't that argument still have some viability in this
21 case?

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1 MR. SVOBODA: Well, at bottom, Mr. Chairman, the
2 Commission is responsible for interpreting its own -- first,
3 it's responsible for interpreting the statute and it enjoys
4 some discretion in being able to do that. It's also
5 responsible for interpreting its own rules and it is on its
6 strongest ground when it does that.

7 So the Commission might reasonably, you know,
8 based on its judgment of the facts and its application of
9 expertise, reach a judgment that a scientific poll is not a,
10 quote, phone bank. It might also similarly reach a judgment
11 that a scientific poll is not a form of advertising under
12 110.11. Those are the classic sorts of judgments that the
13 Commission, as an agency charged with interpreting the Act
14 and credited with expertise in campaign finance law and its
15 administration, that's the sort of judgment to which a court
16 is more likely to defer.

17 CHAIRMAN MCGAHN: But, my point is, if Congress
18 wanted to put disclaimers on polls, they knew what polls
19 were, they could have put that in the statute. But it's not
20 in the statute. The best we have is telephone bank, not in
21 the disclaimer statute, but the definitional section.

1 Congress knew the difference between a poll and voter ID and
2 advocacy calls and all that kind of thing; right? At least
3 we can assume they did?

4 MR. SVOBODA: I think that's correct. And if you
5 look also at some of the legislation that has been
6 introduced subsequent to McCain-Feingold, where members of
7 Congress have asked to amend the law expressly to require
8 disclaimers for push polls and automated phone calls, you
9 get a sense, at least among some in Congress, that they
10 don't feel that they've done that. So it's a strong
11 indication and just goes to show that Congress never
12 intended the disclaimer requirement to apply to these types
13 of polls.

14 CHAIRMAN MCGAHN: Ms. Weintraub?

15 COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.
16 And thank you, Mr. Svoboda, for taking time out of what is
17 undoubtedly a very busy week and also for what I think is
18 one of the more informative and cogent presentations we've
19 seen at one of these probable cause hearings. You have no
20 way of knowing how you stand comparative-wise, but take my
21 word on it --

1 CHAIRMAN MCGAHN: You stand tall.

2 COMMISSIONER WEINTRAUB: You stand tall.

3 MR. SVOBODA: It's not over yet.

4 COMMISSIONER WEINTRAUB: And while the question
5 I'm really dying to ask you is, is Sheila really going to
6 vote for McCain? But no, no, I'm not really asking that.
7 I'm trying to figure out the scope of your argument here.

8 Is -- are you saying that the regulation on its
9 face doesn't apply to these sorts of communications or
10 shouldn't apply to these sorts of communications?

11 MR. SVOBODA: I'm saying doesn't.

12 COMMISSIONER WEINTRAUB: Does not?

13 MR. SVOBODA: Because both the regulation and the
14 statute apply only to advertising and a poll like this by
15 definition is not a form of advertising.

16 COMMISSIONER WEINTRAUB: Okay. So you're not --
17 because I was a little bit unclear -- it sounded almost like
18 an argument for opening another rulemaking and putting an
19 exception into the rule for polls, but that's not what
20 you're saying?

21 MR. SVOBODA: No, Commissioner. I believe the

1 Commission can safely interpret its current rules not to
2 reach these types of communications with the disclaimer.

3 COMMISSIONER WEINTRAUB: And were we to do so,
4 would that be consistent with what we did in the Vitter
5 case?

6 MR. SVOBODA: I believe it would be consistent
7 with half of what you did in the Vitter case. Again, I
8 think the Commission got it half right in Vitter and half
9 wrong. I think the Commission could credibly find that the
10 400,000 advocacy calls required a disclaimer. I think the
11 Commission was on far shakier ground with respect to the
12 90,000 ID's. But, of course, that brings us to the role of
13 the MUR in guiding future enforcement and the MUR itself has
14 no precedential value. I mean, one can wonder whether Mr.
15 Vitter, other than in the circumstances he faced at the
16 time, would have settled that matter on those terms. I
17 suspect he probably wasn't willing to be sued in court in
18 Louisiana at that time over this matter, but that's
19 something that we can't know and that's exactly why a MUR is
20 not -- doesn't have presidential value for the rest of us.

21 COMMISSIONER WEINTRAUB: A fair point. So you

1 think we can cover -- we can require disclaimers on some
2 telephone communications?

3 MR. SVOBODA: I think there is an argument that
4 you can. I think, as the Chairman perhaps indicated in his
5 questions and certainly in the comments that were filed in
6 the rulemaking in 2002, there is a serious question under
7 statutory interpretation whether you can. And we argue that
8 forthrightly in our brief. I mean Congress -- one can only
9 assume that Congress left out telephone bank in 441d for a
10 reason and the Commission needs to consider carefully what
11 that reason was before applying that statute in enforcement
12 to phone calls.

13 But I don't think the Commission needs to decide
14 that in order to decide this case. I think the Commission
15 can decide this case on narrower grounds, if it prefers, on
16 the simple conclusion that a bona fide poll is not a form of
17 advertising.

18 COMMISSIONER WEINTRAUB: And how do we decide what
19 a bona fide poll is? Do we need some kind of standards? Do
20 we, you know, just go on your affidavit, which is very
21 helpful, for Mr. Quinlan and say, well, you know, that looks

1 like a poll? I mean we sort of -- there's been a historical
2 -- I guess it's varied from one Commission to another, but
3 some Commissioners have shied away from an I-know-it-when-I-
4 see-it standard, so how do we know what a bona fide poll is
5 and what a bona fide poll isn't?

6 MR. SVOBODA: Well, it's something that I think is
7 obvious to those in the political community. Just from the
8 face of -- and we list out the sorts of characteristics that
9 it's going to have: A sample size that numbers in the
10 hundreds and not in the tens of thousands; a scientifically
11 designed questionnaire that, among other things, collects
12 demographic information; the aggregation of data for
13 purposes of generating analysis that is used to inform
14 strategic decision-making; the existence of top lines; the
15 existence of cross tabs, all of these are what political
16 professionals recognize as a poll. When I have a client who
17 calls me and says, "I have a poll that I want to share with
18 another organization, you know, how do I value that?" I know
19 exactly what they're talking about. They're talking about
20 that. They're talking about data that's being aggregated
21 and collected for strategic purposes and here, in fact, the

1 Commission's written an entire section of the regulations
2 about polls.

3 The Commission has an extensive history where
4 it seems to know what they are and what they do and how you
5 break down the question results and survey results to gauge
6 the amount to be allocated as a contribution. So the
7 Commission's got experience with this subspecies of
8 communications. It knows what it is and it can recognize it
9 for what it is in this matter. And I think if you looked at
10 the polls in this matter, would see immediately what they
11 are.

12 COMMISSIONER WEINTRAUB: And to the extent that
13 there are unflattering comments about Mr. Thompson in this -
14 - in these polls, your argument is that this is really just
15 message testing. You wanted to see whether these lines of
16 argument would resonate?

17 MR. SVOBODA: Yes. That's exactly right. So, for
18 example, with the October 21 poll and the reference to Osama
19 Bin Laden, I can clearly understand why a campaign would
20 have wanted to test that issue in polling. That might have
21 been the ultimate double-edged sword three years after 9/11.

1 So you might very well think that an argument
2 about Osama Bin Laden would work very well with the voters,
3 but you might have voters with very firm memories of what
4 had happened on that day thinking, I don't want to hear
5 about this, this is offensive to me. I'm not going to
6 listen and I'm going to vote against whoever proposes to
7 talk to me about it. That's part of the reason why you
8 don't see 9/11 imagery that much in political advertising,
9 because it's a raw subject, particularly for those of us,
10 you know, who recall that.

11 So that's totally a reason why they might
12 have tested that before voters at that time. The record
13 doesn't indicate whether the issue was ultimately used or
14 not, but, frankly, I wouldn't have been surprised if it
15 wasn't.

16 COMMISSIONER WEINTRAUB: And a question like -- or
17 a statement, really, like Stan Thompson supported the
18 Republican prescription drug program that was called a big
19 win for the drug industry by the Wall Street Journal. The
20 new program is too confusing, doesn't guarantee lower drug
21 prices and blocked access to safe and affordable drugs from

1 Canada. You know, it sort of sounds like you're telling
2 somebody something, you're not asking them.

3 MR. SVOBODA: Well, it may seem that way, but with
4 knowledge of how a poll is composed and distributed, you can
5 see why it is worded and presented as it is. And here I
6 speak with some benefit as having been a campaign researcher
7 before I practiced law. You'll have a research staff that
8 will do research on an opposing candidate and try to distill
9 it down into points that they think are worthy of political
10 argument. So they may craft a module like that, actually to
11 give to a pollster that they can then test, so they can see
12 does this work or does it not work.

13 So in the October 12th poll, for example, you
14 might see five or six statements about Stan Thompson and
15 what you'll see at the end of the day is top lines and
16 cross-tabular results showing that some of these arguments
17 worked well and some of them didn't. And the ones that
18 didn't are ones that you probably won't hear about ever
19 again in a campaign.

20 So sure, it's being crafted and focused as an
21 attack on the opponent, but it's being done to test it's

1 efficacy in actual political debate and you're going to
2 separate the wheat from the chaff in that process and use
3 what works and discard what doesn't.

4 COMMISSIONER WEINTRAUB: And one other question.
5 There were three sets of polls that were originally looked
6 at. The first one went to exactly 500 recipients. Do you
7 know why that poll was directed towards precisely 500
8 people?

9 MR. SVOBODA: I don't, other than that pollsters
10 tend, from time to time, to craft sample sizes that, you
11 know, come out to round amounts. I mean for the same
12 reason, I assume, that the subsequent sample was 550 and the
13 other one was 800. I don't think it was done -- the record
14 doesn't reflect it was done with any consciousness of the
15 disclaimer requirements.

16 COMMISSIONER WEINTRAUB: That's what I'm trying to
17 get at. That wasn't done as a conscious decision because
18 there was some awareness that something might be triggered
19 if they called one more person, so they stopped at 500?

20 MR. SVOBODA: The record doesn't reflect that at
21 all.

1 COMMISSIONER WEINTRAUB: Well --

2 CHAIRMAN MCGAHN: If I could?

3 MR. SVOBODA: And -- not to hide -- I'm just
4 trying to be responsible with the Commission.

5 COMMISSIONER WEINTRAUB: I understand.

6 MR. SVOBODA: I have no reason to think that that
7 was the case.

8 CHAIRMAN MCGAHN: To get 500 -- to get a sample
9 size of 500 requires more than 500 phone calls. You're not
10 going to get lucky and the first 500 calls are going to be
11 fully completed calls that are going to be statistically
12 significant. You're going to make more than 500 calls, so -
13 - it's a sample methodology; right?

14 MR. SVOBODA: That's correct. And the Chairman
15 reminds me of a point I made earlier in the presentation,
16 which is the Commission might well have concluded that that
17 initial poll was still subject to the disclaimer
18 requirements because of the larger number of calls that was
19 needed to get those respondents, so they wouldn't have
20 helped themselves at all.

21 COMMISSIONER WEINTRAUB: Okay.

1 CHAIRMAN MCGAHN: Could I follow up actually with
2 one question that Ms. Weintraub raised. She was reading
3 from the counsel's brief, footnote one. And to put what's
4 in there in context, these weren't calls that just called up
5 and said Stan Thompson supported the Republican prescription
6 drug program that was called a big win. Even that question
7 was probably followed by something -- does that make you
8 less likely to vote for Stan Thompson?

9 MR. SVOBODA: That's correct. I'd have to look
10 back at the actual questionnaire, but I imagine, from
11 memory, that it reads something like I'm going to read you a
12 number of arguments and I want to know if they make you more
13 likely or less likely to vote against Stan Thompson.

14 CHAIRMAN MCGAHN: Asking that question, after
15 delivering the bad news about a candidate, is that express
16 advocacy?

17 MR. SVOBODA: I don't think it is express
18 advocacy, Mr. Chairman, because it's not a communication
19 that is intended to influence the outcome of an election.
20 In fact, it's rather like what the Commission decided in the
21 Third Millennium advisory opinion where you had a non-profit

1 charity that wanted to gauge the efficacy of internet
2 advertising that mentioned on the one hand Gore and on the
3 other hand mentioned Bush. And they tested them with equal
4 numbers of messages for each, they had no intent of
5 influencing the outcome as well, but it was done entirely
6 for scientific research purposes. And the Commission
7 decided on those facts that it was not an expenditure under
8 Section 431, because it itself had no election influencing
9 purpose.

10 So to answer your question perhaps more precisely,
11 even though the phraseology, would you vote against Stan
12 Thompson if you know thus, might otherwise be express
13 advocacy under 100.22, it is not what the Commission
14 typically regulates as express advocacy and treats as an
15 expenditure under Section 431, because the communication
16 itself is not being distributed for an election-influencing
17 purpose. It is being intended to elicit information so that
18 they can figure out how to influence the election later.

19 CHAIRMAN MCGAHN: Do we really need to reach the
20 subject of intent though? The question contains magic
21 words, but it's a question. And can a question be express

1 advocacy if you're merely asking the question?

2 MR. SVOBODA: Well, I think -- I think that's
3 right. I think that's right. I mean the nature of the
4 communication is going to lead the Commission to a judgment
5 as to whether it's express advocacy or not.

6 CHAIRMAN MCGAHN: Mr. Petersen?

7 COMMISSIONER PETERSEN: I just wanted to go back
8 to a point that you raised a little bit earlier about
9 whether or not we should even consider scientific polls to
10 be phone banks. Throughout your brief, you argued at length
11 about why scientific polls shouldn't be considered general
12 public political advertising. I'm looking at page 10 of
13 your brief where you say, a scientific poll is not a form of
14 general public political advertising. It involves unique
15 dialogues with randomly-selected individuals. It's sole
16 purpose is to elicit information, not to disseminate it.

17 In your opinion, and in advising the Commission,
18 would you advise the Commission to find that scientific
19 polls are not -- not only are they not general public
20 political advertising, but they're not even phone banks
21 under the statute or the regs.

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1 MR. SVOBODA: I think that's correct. I think I
2 could advise the Commission that way, because phone bank, as
3 Congress wrote it -- again, to implement the soft money
4 spending restrictions -- was intended to get at a particular
5 sort of thing. A party's efforts to communicate with and
6 mobilize its voters for purposes of getting them to do what
7 the party wanted to do. And that's something separate and
8 apart from what a scientific poll does, which is simply to
9 elicit information, even without regard to who the
10 individual is or using their identifiable personal
11 information solely for analysis purposes.

12 COMMISSIONER PETERSEN: Okay. So, in other words,
13 the definition of phone bank talks about telephone calls in
14 identical or substantially similar nature, the fact that the
15 way a scientific poll is conducted involves a dialogue that
16 may go -- even though there may be a script of questions
17 that are followed, the way in which it proceeds, this unique
18 dialogue that you refer to might actually take it out from
19 under that definition?

20 MR. SVOBODA: That's correct. A phone bank
21 typically is -- a poll, for example, is going to tend to

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1 have more kind of contingencies, if you will, in terms of
2 what is discussed or isn't discussed with a voter than a
3 party committee's phone bank or a candidate's phone bank
4 will. So, for example, you may have questions that are
5 rotated out for different universes of respondents, you may
6 have questions that aren't asked of certain respondents who
7 fall in certain demographic characteristics, you may have
8 open-ended questions that are asked to the voters where
9 you're seeing open-ended responses. So it's a much more
10 kind of free-flowing dialogue than what the telephone bank
11 regulation for state and local party purposes tends to
12 regulate.

13 COMMISSIONER PETERSEN: Okay. So it sounds like
14 under this line of thinking -- and you've argued against why
15 we should consider a phone bank if a form of general --
16 well, you pointed out why a phone bank was not included in
17 441d, but even if we were to assume that a phone bank should
18 be included under the terms of 441d, it could be argued that
19 even if we were to make that assumption, a scientific poll
20 is not a phone bank and still wouldn't be covered --

21 MR. SVOBODA: Right.

1 COMMISSIONER PETERSEN: -- under the terms of that
2 provision?

3 MR. SVOBODA: So, for example, were you to assume
4 that Section 441d could capture phone calls at all, you
5 might then ask is it a telephone bank and thus a public
6 communication? And you might find that it's not a telephone
7 bank because it doesn't fit that criteria under the
8 regulations. You might also ask yourself is it a form of
9 advertising under 110.11 and hence a public communication
10 and you might find that it's not a form of advertising.

11 COMMISSIONER BAUERLY: Just a brief clarification
12 question. You say that the Commission got it half wrong in
13 Vitter. I just want to make sure I understand. So -- and
14 what you just said is would you consider the second set of
15 calls in Vitter a phone bank?

16 MR. SVOBODA: I -- for disclaimer purposes,
17 Commission, no, I would not. I mean, again, they're just
18 eliciting information. It's just a -- you read the script
19 of those calls in the Vitter MUR and you honestly really
20 can't tell, I mean, whether it's being done for survey
21 research purposes or whether it's being done for ID

1 collection purposes. The other facts that were available to
2 the Commission, the number of respondents -- they talked
3 with 90,000 people -- I think leads to the conclusion that
4 you were collecting individualized for field purposes, but
5 should it have required a disclaimer

6 Clearly, I don't think that that set of calls
7 qualified under 110.11. Might they have qualified as
8 telephone page? I can see how they might have, but I think
9 they have as strong an argument as we do that they didn't
10 qualify as advertising.

11 COMMISSIONER BAUERLY: So for phone bank purposes,
12 the line isn't just whether it's eliciting information
13 rather than conveying information?

14 MR. SVOBODA: Yes. The way -- when they wrote the
15 definition of telephone bank in 431, what they were trying
16 to do was to capture basically geo-tv-related activity. So
17 I guess to come back to your basic question, I could see how
18 the Commission could reach a judgment that it was a
19 telephone bank under 431, I guess, 22.

20 But the question is even if it were a telephone
21 bank, should it still have been subject to the disclaimer

1 requirements? My argument would be that it shouldn't,
2 because it's still nonetheless classified as advertising.
3 But fortunately I'm not here to defend or protect --

4 COMMISSIONER BAUERLY: No. I understand.

5 MR. SVOBODA: -- Vitter case.

6 COMMISSIONER BAUERLY: I just want to make sure I
7 understand where your line is. Thank you.

8 VICE-CHAIRMAN WALTHER: By the way, I want to
9 compliment you on your comments to us. It has been elevated
10 over what we've heard before substantially and thanks for
11 that.

12 COMMISSIONER WEINTRAUB: We're really making him
13 curious.

14 VICE-CHAIRMAN WALTHER: Yes, well, we still have a
15 ways to go, I guess. We have two polls here and we're asked
16 to carve an exception. I consider the exception so far,
17 one's 500 votes, one's 550 calls, and another one is 800.
18 If you look at the statute, it does appear to me, or
19 certainly in this case, it was found that a call to 500
20 people or 550 gave sufficient issue information or public
21 polling information to satisfy their needs. And, at some

1 point, and I'm told by Mr. Elias and a number of others,
2 that by-line is good, because it helps everybody -- gives
3 guidance on the outside community and it gives us an easy
4 way to enforce a statute or regulation without trying to
5 become an expert in every given case as to what's
6 advertising and what's not, say, in this particular case.

7 So I can see a benefit to some kind of bright-line
8 rule. If you look at it here, in one of the cases, my
9 impression from -- Mr. Quinlan says the 500 or more may be
10 appropriate, but it doesn't say that it had to be over 500
11 calls in order to make a reliable poll. So the point to me
12 is I'm wondering, just give me something to advance my
13 thinking, maybe a bright line is helpful here to have a
14 poll, or you can have more than 500, if you want to take
15 more than 30 days, and you can have substantially more than
16 that if you do more than 500 and after that, maybe a
17 disclaimer at that particular point makes sense for our
18 bright-line purpose.

19 And I'm not sure exactly what the intent of
20 Congress was, but it does happen to fit with what I'm
21 reading here is that the true opinion polls don't have to be

1 very large. I gather if you find the statistically
2 appropriate people to contact, and maybe in some cases it
3 would be more, but if you want to go more than 500, you
4 could do it in 31 days.

5 So I'm interested in your thought as to line of
6 demarcation. Is there some empirical evidence to show that
7 that bright-line doesn't capture a majority and that bright-
8 line doesn't capture a majority or a substantial majority of
9 truly competent opinion polls?

10 MR. SVOBODA: Well, Commissioner, we do often
11 favor the Commission drawing bright-lines, it's helpful to
12 all of us, but it has to be not only a bright line, it has
13 to be the right line. And the hand that the Commission's
14 been dealt with, 441d and 110.11, is that by its terms it's
15 restricted only to advertising. So you could argue in this
16 case that that, in fact, is the bright line that the
17 regulation applied only to advertising and the question the
18 Commission has to answer in this MUR is is this a form of
19 advertising? And we would suggest that the record says it's
20 not.

21 To respond to your question about the sample sizes

1 and why committees can't simply make do with a smaller
2 sample size, I think there's three potential problems with
3 that. The first is there's no evidence at all that that's
4 what Congress intended committees to have to do as a
5 consequence of the disclaimer requirements.

6 The second, as I mentioned earlier to the Chairman
7 and to Commissioner Weintraub, is that to get those 500
8 responses, you have to have many, many more people in order
9 to do that. So it may be, as a practical matter, impossible
10 to do what you would propose a committee to do.

11 Thirdly, in a competitive Senate race or in the
12 presidential race, you have a phenomenon called tracking
13 polls, where they will go into the field night after night
14 after night with the same questionnaire so they can see how
15 they're doing from one day to the next. So I guarantee you
16 that Barack Obama and John McCain today are calling 500 or
17 1,000 voters with the same 10 questions and asking them for
18 responses to those questions. And there's simply no way for
19 a sophisticated campaign to be able to do that over a 30 day
20 period, particularly the 30 days before the election, and
21 comply with the disclaimer requirement under that view.

1 The presidential campaigns -- frankly, here I'm
2 veering beyond my expertise, but I would not be at all
3 surprised if they had been tracking since March, because
4 they want to know where they are. So you will have a
5 committee that's always risking noncompliance with the
6 Commission's view of the disclaimer requirement if you're
7 applying that requirement to public polls.

8 And then last, you know, it goes to the point I
9 made in the beginning of the presentation, which is that --
10 this is -- we're not asking the Commission here for an
11 exception, we're asking for the Commission to interpret and
12 apply its rules on their face, which apply on their face
13 only to advertising. And if Congress had wanted to extend
14 that requirement to this type of communication, if they had
15 wanted to, they would have done it.

16 I would be extremely surprised if they would have
17 wanted to at all, because they know very well how these
18 types of communications work and the consequences that
19 something like this would have for the efficacy of those
20 communications.

21 VICE-CHAIRMAN WALTHER: In this particular case,

1 I'm a little bit troubled though. When you read the
2 questions that we're proposing, and they seem to me to be --
3 they may get a response, but it's really not the response
4 that they care about, it's really a matter of suggesting,
5 not so subtly, that maybe with any particular background at
6 all, it seems like this particular candidate might -- give
7 us just a sec, sir.

8 One of them was Stan Thompson opposes additional
9 spending in Afghanistan, which I'm told is false; that, in
10 fact, that support for additional funding has quite often
11 been there, so if you ask him, how did you feel if they said
12 that, when it's a false piece of information, other
13 considerations aside, let's look at this as an advocacy
14 piece. Do you really feel that -- I mean is there some
15 genuine polling expertise that suggests that that's really
16 going to truly elicit some information that would help in
17 the campaign by asking the question that does not apply to
18 the opponent. Likewise, that we'll -- and they used all the
19 words and the fight against terrorism, and so I'm not really
20 sure -- to me it seems to imply that they don't care much
21 about the answer, it's pretty much they want to give that

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1 impact that perhaps relates to this particular gentleman
2 when there's probably not, from what we read, a likelihood
3 that that's so.

4 And then on another one -- oh, the idea of
5 pointing out the record of the opponent as being an advocate
6 of a campaign against big tobacco and then his firm
7 representing that seems to suggest that perhaps the opponent
8 is a hypocrite when I'm not sure how that really resonates
9 in terms of campaign strategy other than conveying a
10 message.

11 So how are we as a Commission going to sit here
12 and look at every one of these from here on out and try to
13 discern with any kind of finite or definitive guidance what
14 is and what's not going to fit in a situation like this.
15 And I think we're going to find ourselves in kind of a
16 metaphysical discussion a lot of times trying to figure out
17 what's fair, and people in the regulated community are going
18 to have a hard time figuring out what we're going to do.
19 That's my concern.

20 MR. SVOBODA: Well, Commissioner, I think you can
21 look to the character of the communication to reach a

1 judgment about whether it qualifies as advertising or not.
2 And this is where Al Quinlan's affidavit, I think, is
3 helpful. He makes the point in the affidavit and here I'm
4 elaborating on it a bit. If I had wanted to communicate to
5 voters in Iowa that Stan Thompson didn't want to fund the
6 search for Osama Bin Laden, I wouldn't do it through a poll
7 distributed to 800 people for which I'm paying \$10,000.00.
8 I'd do it with a robo-call being sent to 80,000 people,
9 lasting a minute, for which I would pay \$10,000.00, if not
10 less.

11 So one of the points that Mr. Quinlan makes is
12 that this medium of communication, this type of
13 communication is not one that by its nature lends itself to
14 the efficient distribution of political information. And so
15 we can look to the character of the communication to reach a
16 judgment as to whether it's advertising or not. Now, if
17 somebody had sent a robo-call to 80,000 Iowans saying Stan
18 Thompson is a hypocrite because he represented the big
19 tobacco companies, then the Commission might very well reach
20 a judgment that that is a form of advertising and that ought
21 to be subject to the disclaimer requirement, but that's not

1 this case. That's not this type of communication.

2 VICE-CHAIRMAN WALTHER: One more quick question.
3 Do you have any idea for Congress' intent when they used the
4 number 500, where that came from? Because my impression,
5 just really without looking at the Congressional intent for
6 that purpose, is they pick a number that figures, well, if
7 political committees are going to contact more than 500
8 people, it must be some kind of a political message and for
9 that reason we want to make sure there's a disclaimer
10 involved. I mean there may be a bright-line that was
11 suggested and was adopted, but do you know where 500 came
12 from?

13 MR. SVOBODA: Well, 500 came from the definition
14 of public communication or, more specifically, the
15 definition of telephone bank, which was incorporated into
16 the definition of public communication for purposes of soft
17 money fundraising and spending restrictions. So what
18 Congress was trying to do there and was doing it with no
19 consciousness of the disclaimer requirement -- what Congress
20 was trying to do there was to make sure that state parties
21 couldn't spend soft money to support federal candidates by,

1 you know, communicating with a large pocket of voters at
2 once. And I don't know how they came to an exact number 500
3 when they crafted the definition of telephone bank or
4 crafted the definition of public communication. I assume
5 that Congress thought that it was a useful proxy to capture
6 the extent of communications that would have an election-
7 influencing purpose.

8 And I've heard others argue, you know, in
9 rulemakings over other similar issues that perhaps, you
10 know, larger numbers are more appropriate for those sorts of
11 judgments, but that's a judgment Congress made. But it's
12 important to know that that's a judgment that Congress made
13 for the FEA restriction, they did not make it with any
14 consciousness of the disclaimer requirement. They imagined
15 the disclaimer requirement to apply to advertising.

16 CHAIRMAN MCGAHN: You don't know if in the
17 franked- mail magic number how many pieces of mail you need
18 approval?

19 MR. SVOBODA: It may have been 500.

20 CHAIRMAN MCGAHN: Which to me infers that that's a
21 number more to what kind of money you're going to use and

1 what kind of review you may need, and it's a number that
2 Congress had used in another context as to what required
3 special treatment, which is consistent with the argument
4 that it's a -- the definitional section is the hard money
5 versus soft money distinction, not the disclaimer
6 distinction.

7 MR. SVOBODA: Correct.

8 CHAIRMAN MCGAHN: It always struck me that that
9 was just a number they grabbed from someplace they already
10 had. Ms. Hunter I think had some questions? Vice-chair?

11 COMMISSIONER HUNTER: Thank you. Thank you.
12 Having run a couple of phone banks and having participated
13 in, I agree with you that this activity was not a phone bank
14 and I also agree that Congress would have added phone bank
15 into the disclaimer section had they wanted to. They
16 certainly know what phone banks are and what polls are and
17 they would have added it.

18 My question is going back to some of their
19 procedural issues that the Chairman brought up at the
20 beginning of the hearing and one question I have is when
21 you sent your brief, I think you called it response to the

1 "Reason to Believe" finding in MUR 5835 originally on
2 February 12, 2008. And you said the next time you received
3 anything from the Commission was on July 1, 2008, which I
4 think was my first day here. Is that correct?

5 MR. SVOBODA: That's correct.

6 COMMISSIONER HUNTER:

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9 MR. SVOBODA:

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9 COMMISSIONER HUNTER: So as a general matter, you
10 believe that the general counsel believes that when there's
11 a finding of "Reason to Believe", as a legal matter, that's
12 sort of the end of the story? And you have to agree or
13 disagree with that? That's not the way I understood it. I
14 thought that "Reason to Believe" was just a "Reason to
15 Believe" and that it was possible that there wasn't a
16 finding, because that's the way I understood "Reason to
17 Believe" to be.

18 MR. SVOBODA: Well, first, I think the consistent
19 position of the general counsel's office throughout the
20 matter has been that my client violated the law. And so I -
21 - so that, I think, has been their perspective throughout

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1 the briefing. One thing that I know from a practitioner's
2 perspective, has happened, you know, more frequently in
3 recent years with the Commission is to reach a finding of
4 "Reason to Believe" and very quickly offer pre-probable
5 cause conciliation as a way to resolve the matter so as to
6 avoid the need for further litigation. That way the general
7 counsel is able to obtain an admission that a respondent
8 violated the law, is able to obtain a penalty and the
9 Commission is able to dispose of the matter efficiently.
10 That was something that was not, however, going to be useful
11 to our clients in this matter, at least in terms of
12 admitting a violation or paying a penalty, because it
13 remains our position that we didn't violate the law.

14 COMMISSIONER HUNTER: Okay. Thank you. And in
15 the conversation that you had with the general counsel's
16 office, did they discuss with you the theories that you
17 presented here today?

18 MR. SVOBODA: We did discuss them. I think -- in
19 one sense I would prefer to let them speak for themselves,
20 but I think from the papers it's clear that their position
21 is that because it was 500 phone calls -- because it was

1 more than 500 phone calls over a 30-day period, it was a
2 telephone bank. Because it was a telephone bank, it was a
3 public communication because a public -- it was a public
4 communication, it required a disclaimer under 110.11 and
5 that decides the legal question. And so that's the way I
6 read their papers and I think that fairly reflects their
7 position.

8 It did become clear to me in our back and forth
9 with OGC that the purpose of the communication and the
10 nature of the call did not seem relevant to the legal
11 analysis.

12 COMMISSIONER HUNTER: Okay. Thank you. And you
13 did -- obviously you received a copy of the general
14 counsel's brief, which is a response to your memorandum of
15 the DCCC in response to the "Reason to Believe", and in that
16 they reiterate their legal position from the original
17 factual legal analysis. I believe it's the same, with the
18 exception of they add a footnote to the Vitter MUR. But
19 it's the same legal analysis and it doesn't get into the
20 level of detail that yours does. But you're right, they are
21 steadfast in their conclusion that your client violated

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1 441d. But my question -- when you said that MURs have no
2 precedential value, that -- I don't think I've ever heard
3 anybody say that here and I just wanted to sort of hear your
4 thoughts on that. And, also, the Vitter MUR is included in
5 the general counsel's brief here, so is that -- that's your
6 understanding in the regulated community that MURs don't
7 have any precedential value?

8 MR. SVOBODA: That's correct. The Commission has
9 been very forthright in other matters saying that the sole
10 avenue to say what the law is is through rulemaking. That's
11 what the Commission said, for example, in 1999, when it was
12 taking up the audits of Senator Dole and President Clinton.
13 And so rulemaking is the sole means that the Commission has
14 in order to impose new norms on the regulated community.

15 What a MUR reflects is how the Commission and the
16 respondents at the end of the day chose to apply the law to
17 a particular set of facts. And at the end of the day, when
18 you have a conciliation agreement, it is something that the
19 Commission has authorized the general counsel to propose,
20 that the respondents have agreed to after typically some
21 negotiation, and that the Commission has agreed to adopt.

1 But just because a respondent in a one case chose
2 to accept and not contest a characterization of the law,
3 does not bar someone else later from challenging that same
4 interpretation of the law. For example, I think if Mr.
5 Vitter had chosen to litigate rather than settle with the
6 Commission in his matter, I'm not sure it might not have
7 turned out differently.

8 COMMISSIONER HUNTER: Okay. Thank you.

9 CHAIRMAN MCGAHN: What's the significance of MURs,
10 though, where there's a finding that's beneficial to a
11 respondent? The Commission either finds no "Reason to
12 Believe" or fines RTB with no further action. It may not be
13 precedent in the judicial sense, but under whether it's APA
14 or due process or fundamental fairness or whatever sort of
15 other arguments you want to make, do those sorts of cases
16 have any significance? And if so, does that apply here?
17 Are there any other cases where this may have been raised
18 and the Commission may have not taken action that would be
19 something -- that may be persuasive, if not precedential.

20 MR. SVOBODA: Well, they do. I mean the
21 Commission under the APA is bound, I mean, to act, you know,

1 with process of recent decision-making and not to act
2 arbitrarily and capriciously. And if the Commission did
3 that, for example, by choosing not to enforce under one
4 theory in one instance and then choosing to enforce against
5 an identical set of facts, you know, in the reconcilable
6 theory, that could be arbitrary and capricious conduct by
7 the agency.

8 CHAIRMAN MCGAHN: Do you have any sense -- do
9 others outside the building share your view of whether or
10 not polls need disclaimers? And, if so, any sense that your
11 client feels like they're being singled out as the unlucky
12 test case?

13 MR. SVOBODA: Well, I don't know that the facts
14 would support that my client has been singled out because of
15 who they are, but I do believe that it is very, very
16 uncommon for political committees to include disclaimers on
17 their research polls. And one of my predictions, frankly,
18 is that if the Commission finds probable cause in this
19 matter, your enforcement business is going to go up
20 substantially. Because there will be a lot of people who
21 will have violated this interpretation of the regulation.

1 CHAIRMAN MCGAHN: The regulation's been on the
2 book since 2002?

3 MR. SVOBODA: Correct.

4 CHAIRMAN MCGAHN: It's now 2008.

5 MR. SVOBODA: And the first post-BCRA campaigns
6 began in 2003, so we've got some weeks left here under the
7 statute of limitations.

8 CHAIRMAN MCGAHN: I see. Right. Right. Two
9 final questions just to confirm. In the rule that's at
10 issue in the rulemaking, the notice didn't say that the
11 Commission was considering whether or not polls needed
12 disclaimers. Is my recollection correct on that point?

13 MR. SVOBODA: That's correct. It never discussed
14 public opinion polls at all in the 2002 rulemaking.

15 CHAIRMAN MCGAHN: But then the final rule, now in
16 2008, purports to include something that was not in the
17 notice, Cover something that was not in the notice.

18 MR. SVOBODA: That would be true if, indeed, the
19 rule actually purported to do that. What the Commission --

20 CHAIRMAN MCGAHN: Hence my reference to the
21 calendar year. Now in 2008, that rule now reaches conduct

1 that was not in the notice, didn't appear to be in the rule,
2 arguably, at the time the rule was promulgated and now we
3 are here three, four, five, six years later. Now, all of a
4 sudden, oh, polls may be covered.

5 MR. SVOBODA: Well, that's correct. And the
6 regulated community is entitled, as the Commission knows
7 well from the Shay's litigation, to some specific notice of
8 what the Commission is actually proposing to do in the
9 rulemaking. The absence of that notice can subvert the
10 Commission's ability to enforce that sort of aggressive
11 interpretation later and make it stand in court. It begs
12 the question of whether the Commission, even if it wanted to
13 apply 441d to a bona fide poll, could still do that. But
14 the fact of the matter is the absence of notice and comment
15 in this instance is itself a significant barrier to taking
16 that position.

17 CHAIRMAN MCGAHN: If your client -- if the
18 Commission found probable cause and if your client did not
19 want to conciliate and if the Commission decided to go to
20 court, your client's in Washington, D.C., therefore the
21 district of D.C. and the D.C. Circuit would be -- the court

1 -- essentially the Shay's appellant court would be the
2 governing court with respect to your client; correct?

3 MR. SVOBODA: That's correct.

4 CHAIRMAN MCGAHN: Final question, from me anyway.
5 Any First Amendment concerns on this that -- or other
6 constitutional issues? It seems like we have a reg that
7 some say may reach this conduct. Is there any sort of
8 guidance you can give us on whether or not we have to read a
9 reg to its extreme? Or is there some sort of constitutional
10 limits at how we read our regs?

11 MR. SVOBODA: Well, there are First Amendment
12 concerns and they apply generally to the subject of
13 disclaimers, as we know from the McIntyre case, as we know
14 from the Public Citizen case. Whenever you impose a
15 disclaimer on a communication, you are forcing someone to
16 say something that they don't want to say and that imposes
17 First Amendment concerns. And the courts upheld -- the
18 Supreme Court in McIntyre and the 11th Circuit in Public
19 Citizen -- have held that the Commission or like agencies
20 can do that, but only when its supported by an overriding
21 state -- by an overriding governmental interest. And that

1 interest is just not present here. It's not like any of the
2 interests that were laid out in Public Citizen. The issue -
3 - the interest, for example, of helping the electorate judge
4 the content of campaign advertising, protecting against
5 corruption, none of those interests are satisfied here.

6 And there's also a First Amendment consequence
7 that's unique here and that perhaps goes beyond what the
8 disclaimer cases normally would talk about, which is that
9 you're talking about political organizations that are
10 seeking to elicit information from voters to guide their
11 strategic decision-making. We can argue among ourselves
12 whether polling is a good or evil in the political world,
13 but the fact of the matter is it's a fact of life in the
14 political world and if the Commission were to embrace an
15 interpretation that was to make public opinion polling
16 difficult, if not impossible, in the political world, it
17 would have grave consequences on the ability of candidates
18 and committees to elicit information and develop their
19 messages and present them most effectively to the voters.
20 And that, itself, I think is a First Amendment concern that
21 surpasses even those raised by the anonymous speech case in

1 McIntyre or by the disclaimer case in Public Citizen.

2 CHAIRMAN MCGAHN: McIntyre wasn't a disclaimer
3 case; right? There was some advocacy involved and it looks
4 like a local ballot issue or something.

5 MR. SVOBODA: Correct. It was about whether -- it
6 was whether, basically, anonymous speech could be permitted
7 in that election.

8 CHAIRMAN MCGAHN: Ms. Weintraub?

9 COMMISSIONER WEINTRAUB: Thank you, Mr. Chairman.
10 A couple of follow-up questions. First, on precedent. I
11 completely get your point that, you know, we shouldn't hold
12 it against you that David Vitter decided for perhaps
13 unrelated reasons not to fight to the utmost on this precise
14 issues and I think that's a perfectly fair point, but to say
15 that the MURs have no precedential value is perhaps an
16 overstatement. I mean surely when -- I know this is true.
17 Surely when your clients come to you and say, am I going to
18 get in trouble for doing this, one of the things you do,
19 other than just looking at the statute and the regulation,
20 is to look at prior MURs, to see what has the Commission
21 done in the past in similar circumstances. And you feel,

1 you know, not 100 percent certainty, but perhaps some --
2 there's some predictive power from what we've done in the
3 past that perhaps the Commission will act similarly in the
4 future; isn't that right?

5 MR. SVOBODA: Well, I think that's correct. And
6 perhaps a better way to put my point is that MURs themselves
7 do not establish binding norms on the regulated community
8 that didn't exist before. So if we all lived in a world,
9 until last year, where public opinion polls didn't have to
10 have disclaimers or pure ID calls didn't have to have
11 disclaimers, but all of a sudden the Commission decrees in
12 the Vitter MUR that they do and waves the Vitter MUR as the
13 authority for why polls have to have disclaimers, then
14 that's a problem under the Commission's rules and it's a
15 problem under the APA. Because the Commission is supposed
16 to reach those sorts of judgments through a process of
17 rulemaking.

18 COMMISSIONER WEINTRAUB: And that's a perfectly
19 fair point, but, although, it's also true that the courts
20 have endorsed in various circumstances the Commission
21 proceeding on a case-by-case basis and developing the law,

1 actually, through MURs. You know, it did in the political
2 committee when we were challenged for not issuing a rule on
3 political committees, the court said it's a fair choice or
4 that it's a legal and acceptable choice for the Commission
5 to make, to say, well, we're just going to develop this as
6 we go. And so there's -- you know, it's in this sort of --
7 I'm not saying that it's -- you're locked in. I'm not
8 saying that -- you know, I think that your point has some
9 merit, but it's not -- we're sort of a little bit in a gray
10 area.

11 CHAIRMAN MCGAHN: Isn't it true thought that once
12 the Commission decides to go down the rulemaking path, that
13 is the rule system? I mean an agency can decide to do it on
14 a case-by-case basis. Courts have said that's okay. But
15 you can't go to rulemaking, have a rule, and say now we're
16 going to go case-by-case. Doesn't the APA sort of force you
17 to take the fork in the road much sooner?

18 MR. SVOBODA: Well, that's correct. And what --
19 in fact, what the Commission is -- you know, here it's not a
20 question of the Commission trying to reach a judgment of how
21 a statute or regulation effects a particular discreet,

1 unusual set of facts, as may be the case, for example, in
2 the political committee context, or, as may be the case, for
3 example, in the corporate facilitation context, where you
4 may have different sorts of conduct that may fall under the
5 ambit of a fairly broad rule.

6 Here the Commission is being asked to take
7 something that every political committee, ever major
8 political committee does everyday and is about to tell them,
9 you now have to do it differently. And that's the sort of
10 thing that needs to be done through rulemaking.

11 COMMISSIONER WEINTRAUB: I get that. I totally
12 get that. Second point. You seemed to say before in
13 response to the vice-chairman's questions that if one were
14 to take some of the statements that were in these polls in
15 isolation, the Afghanistan statement, for example, and send
16 that sentence and that sentence alone to 10,000 phone
17 numbers, that that would be a -- that could require a
18 disclaimer. That would be something different in kind than
19 what happened here. Am I hearing you correctly on that?

20 MR. SVOBODA: Correct.

21 COMMISSIONER WEINTRAUB: Is there some magic

1 number -- I mean, you know, I laughed when the Chairman
2 asked before about franking rules, because I strongly
3 suspected that he knew the answer to his own question, but,
4 you know, the Congress has picked 500 --

5 CHAIRMAN MCGAHN: That's usually the case.

6 COMMISSIONER WEINTRAUB: Congress has picked 500
7 in other contexts, but is there some number that would make
8 sense, that one would say, well, if they send that many
9 phone calls, whether they do it by robo-call or they've got
10 an army of volunteers out there dialing numbers, that in and
11 of itself is evidence that what we're looking at is a push
12 poll or an attempt to influence people's votes and not a
13 bona fide opinion poll?

14 MR. SVOBODA: Well, there's -- some of the
15 disclaimer regulation that's now before Congress actually
16 tries to do that. They chose numbers that are well north of
17 the 500 that's in the Commission's definition of telephone
18 bank now to try to weed out, if you will, bona fide polls
19 from other types of polls and I'm at a loss to recall
20 exactly what that number is. I think it's somewhere between
21 one and 2,000 completed calls.

1 COMMISSIONER WEINTRAUB: Well, the Push Poll
2 Disclosure Act of 2007 that you allude to in your very
3 informative memo says 1,200.

4 MR. SVOBODA: Correct. But --

5 COMMISSIONER WEINTRAUB: So is there a real legal
6 distinction though between 800 and 1,200?

7 MR. SVOBODA: I think the way I would recommend
8 the Commission to approach -- the issue we're trying to get
9 across is that the character of the communication matters
10 and that numbers are a way of helping assess the character
11 of communication, but it's not the only way of assessing the
12 character of communication. Because just because it goes to
13 501 people, it doesn't mean it's advertising. And so
14 numbers can be a proxy for that and, again, to take it at a
15 50,000 foot level, that's perhaps where the 800 calls on the
16 October 21 poll are different in kind from the 490,000 calls
17 in the Vitter MUR. I mean they're different because this
18 speaks much more clearly a scientific research purpose, but
19 the numbers are a level -- a rough lever -- to get at the
20 character of the communication.

21 COMMISSIONER WEINTRAUB: And we could recognize

1 that difference without figuring out here what the magic
2 number is that puts you over the edge?

3 MR. SVOBODA: That's correct.

4 COMMISSION WEINTRAUB: Now, I just want to clarify
5 in my own mind and to give you a chance, if I'm not getting
6 this right, to elaborate on this. The legal argument that
7 the regulations do not cover this activity and the way I
8 would parse that is, you know, we've got 110.11 that says,
9 the following communications must include disclaimers, one,
10 all public communications as defined in 11 CFR 100.26 made
11 by a political committee. Then you flip back to 100.26 and
12 a public communication means a communication by means of any
13 broadcast cable or satellite communication, newspaper,
14 magazine, outdoor advertising facility, mass mailing, or a
15 telephone bank to the general public or any other form of
16 general public political advertising. And as we learned in
17 the Internet context, that's not an exclusive -- the list
18 and the statute is not an exclusive list, that any other
19 form of general public political advertising must include
20 something other than what's in that list. That's what the
21 courts said when they rejected our -- the Commission's

1 attempt to totally exclude the Internet.

2 So the argument, I assume, would be that by using
3 that phrase at the end, or any other form of general public
4 political advertising, that that somehow modifies everything
5 that came before it. So even if something were a broadcast
6 cable, satellite communication, newspaper, magazine, outdoor
7 advertising facility, mass mailing, or telephone bank to the
8 general public, if it were not a form of general public
9 political advertising, it wouldn't be covered; is that the
10 argument? Or is there more to it or less to it? Or am I
11 entirely getting it wrong?

12 MR. SVOBODA: Well, that's it. And I think
13 there's a little more to it, too. If you follow the causal
14 chain -- and I think you lay out very neatly what I take the
15 general counsel's chain to be, which is it was sent to more
16 than 500 people, ergo it's a telephone bank, ergo it's a
17 public communication, ergo it's covered by 110.11, the
18 question is when you inspect that causal chain, you know,
19 where are the weak links? And I think there are two weak
20 links here. The first is what you identify, which is that
21 to be a public communication for 431.22 purposes, but

1 definitely for 441d purposes, it has to be a form of general
2 public political advertising. It has to be advertising.
3 The character of the communication matters.

4 'So I think that's the first weak link in the
5 chain, which is to assume just out of the box that because
6 these polls were conducted by phone and conducted to more
7 than 500 people, that they were a form of advertising. The
8 facts clearly indicate that they're not.

9 The second weak link in the chain, I think, is the
10 characterization of the polls as a telephone bank. Because,
11 again, to get back to what we talked about earlier,
12 telephone bank in the eyes of Congress can fairly be read to
13 capture a specific sort of communication and not this sort
14 of communication, something that's used to mobilize voters,
15 something that's used to communicate individually with
16 voters and not this type of communication.

17 So these are the weak links, I think, in that
18 analysis and I would caution the Commission against just
19 following it blindly to where it seems to lead, because you
20 have to dwell on each of these terms and understand what
21 they really mean and what Congress meant them to mean in

1 order to get to the destination at the end of the road,
2 while seeing that where you're asked to go at the end of the
3 road is somewhere where no one expected to go.

4 COMMISSIONER WEINTRAUB: So it's neither
5 advertising nor a phone bank?

6 MR. SVOBODA: Correct.

7 COMMISSIONER WEINTRAUB: Okay.

8 CHAIRMAN MCGAHN: A hypothetical. Let's say
9 election night Chairman Van Hollen decides to call every
10 democratic candidate for the U.S. House and then places a
11 separate call to every campaign manager and says the same
12 thing every time: hey, I appreciate your running. You ran a
13 good race. I just want to say hello and anything you need
14 from me, you know, you'll always have a friend in
15 Washington. Thank you. Same script, more than 500 calls.
16 Is that a telephone bank that requires a disclaimer?

17 MR. SVOBODA: Well, I don't think it requires a
18 disclaimer, because it's clearly not advertising. It's
19 rather like how we describe the polls in our brief, which is
20 a dialogue between individuals, but I can see how the
21 mechanical analysis you're being asked to accept would lead

1 you to that conclusion. I mean it goes --

2 CHAIRMAN MCGAHN: It goes back to the dog -- if
3 something has four legs and a tail, it's therefore a dog,
4 even though cats -- it's the same kind of thing you alluded
5 to in your beginning.

6 MR. SVOBODA: Now, I'm following quite happily
7 your fiction that there's 500 democratic members of
8 Congress. Not even the Constitution --

9 CHAIRMAN MCGAHN: Please, Counsel, it doesn't -- I
10 said candidates. I didn't say win or lose.

11 MR. SVOBODA: Indeed.

12 CHAIRMAN MCGAHN: Let's not change my
13 hypothetical.

14 MR. SVOBODA: We're being ecumenical, we're
15 calling both sides of the aisle. But assuming for the
16 moment that that's the case --

17 CHAIRMAN MCGAHN: All democratic -- I'm assuming
18 you have somebody on the ballot everywhere, so you have --

19 MR. SVOBODA: Sure. We're calling congressmen,
20 senators, state legislators, dog catchers.

21 CHAIRMAN MCGAHN: Whoever's on the ballot, you're

1 just calling to say hello and mechanically that would be
2 more than 500 calls saying the same thing and therefore
3 telephone bank and disclaimer. But that can't -- that's an
4 absurd result.

5 MR. SVOBODA: Yes. And if you look at the E&J for
6 the federal election activity definitions in 2002, you see
7 that scripted materials count for public communication
8 purposes; that if you're providing a rough template of what
9 people are going to say, even if you anticipate that you're
10 going to vary here or there, it's still a public
11 communication for FEA purposes. So, yes, you follow that
12 mechanical analysis, that's exactly where it leads you.

13 CHAIRMAN MCGAHN: Mr. Petersen?

14 COMMISSIONER PETERSEN: I just have one last very
15 simple question. I think the answer you've implied earlier,
16 but I just wanted to ask it directly and that is, did your
17 client in this case actually receive data -- you know, the
18 cross-tabs, the top lines -- as a result of the polls at
19 issue in this matter?

20 MR. SVOBODA: I don't know the answer to that and
21 I'll you why I don't know. The DCCC paid for these polls as

1 a 441AD expenditure in support of Leonard Boswell, so it was
2 a situation where the campaign went to the campaign's own
3 pollster, conducted the poll, and then went to the DCCC and
4 said, here, pay the bill for us. And that's a peculiarity
5 of the 441AD process. It's just when party committees
6 basically pick up the expense on behalf of a candidate as
7 the statute allows them to do.

8 Now, the facts in this case indicate that the DCCC
9 was aware that they were going to be paying for the polls as
10 they were conducted. The date of the invoices and the fact
11 that they were issued to the DCCC doesn't allow me to say,
12 well, gee, we knew nothing about this, they just came to us
13 with the bills months later and asked us to pay it, but it
14 does raise a wrinkle here that is worth considering, however
15 briefly, which is that all the time people will go to party
16 committees with bills from their pollsters and say, would
17 you pay this for us, this 441d. Here's the poll we did, you
18 know, a month-and-a-half ago, would you pay the bill for us,
19 and the party committees, as they appropriately do under
20 441d say, sure, we'll pay it for you.

21 But if they do that, and you adopt this view of

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1 this case and the sample size exceeds five hundred bucks,
2 then each of these are going to result in prima facie
3 violations of the law, because the disclaimer at the outset
4 is never going to correctly say who paid for the poll. It's
5 never going to say that the party committee paid for the
6 poll. It will be incorrect, because at the time they were
7 doing the poll, the campaign was thinking they were paying
8 for it, and indeed at the end of the day they didn't. So
9 it's a catch 22 for political committees and it's one of the
10 many, many traps that this line of reasoning in this case
11 leads you to potentially.

12 I think that's far from the most significant
13 reason to rule for us and I -- it doesn't really apply to
14 this particular matter, but it's one problem that the
15 Commission will have to deal with if it applies disclaimers
16 to polls in this case.

17 CHAIRMAN MCGAHN: Any other questions from the
18 Commissioners? If not, our policy statement. General
19 counsel can ask questions of respondent's counsel.

20 MS. DUNCAN: Thank you, Mr. Chairman. Good
21 afternoon. I think that the questioning has elicited a good

1 formulation of the distinction between our legal position
2 and yours, and the difference between our interpretation of
3 the statutes and the regulations as to whether a disclaimer
4 is required for these particular communications and issues,
5 so I won't belabor that point.

6 I do think that your position suggests that the
7 Commission would have to, for each of these types of
8 communications, determine whether they are a bona fide
9 scientific research poll or general political advertising.
10 And I think there's already been some hints at how making
11 those determinations might be difficult in an environment
12 where we don't really have established standards for doing
13 so.

14 I think you've suggested that there's some
15 characteristics or the character of the communication can be
16 looked to in terms of the number of people called or the
17 time that's used during the call in order to determine
18 whether we're talking about advertising here or actually a
19 research poll.

20 I wanted to just focus for a minute on the content
21 aspect of it and to look at the Quinlan affidavit, which

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1 suggests that there can be some negative information
2 imparted in these calls without transforming it into
3 advertisement. Let me just ask if you have a sense of, you
4 know, when you crossed the line there? I mean what
5 percentage can there be of that kind of information before
6 this becomes an advertisement or general political
7 advertising requiring a disclaimer versus a scientific
8 research poll, because I think under your approach those are
9 the kinds of questions the Commission would have to answer,
10 assuming now that the -- as you call it -- the character of
11 the communication, the number of people polled, and the time
12 spent on the phone doesn't give you that answer clearly,
13 that you really are having to look at the content of the
14 call.

15 MR. SVOBODA: Right. Well, my first observation
16 on that is that the Commission in other sections of the
17 rules knows or at least claims to know what a poll is.
18 Under 106.4, for example, it recognizes a species of data
19 that is allocated among different committees and allocated
20 on its expenses among candidates -- and it did that after
21 extensive rulemaking, so the Commission has been able in the

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1 past to distinguish between survey research polls and
2 distinguish between other forms of advertising. It's
3 already done so in 106.4 and this is a subject where I think
4 the Commission can appropriately rely on its expertise and
5 the campaign finance laws and in the practices of elections.
6 I mean, for example, if you go to the file in this case and
7 look at these questionnaires, you can tell that they're
8 polls. I mean I hate to sound like Potter Stewart saying I
9 know it when I see it, but you look at it and you know what
10 they are. And if you took it to a political operative,
11 they'd know what it is and they'd know the difference
12 between it and the advocacy calls in the Vitter MUR. They
13 would just know that off the top of their head.

14 So with that as background, then the question
15 becomes to what extent can a candidate poll positively, poll
16 negatively, to what extent do they need to be ecumenical in
17 talking about the good things about themselves and the bad
18 things about their opponent. And I don't think the rules
19 require them to have any sense of balance in that, other
20 than what is useful for them in developing their data
21 strategically.

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1 You might have a candidate, as was the case in
2 these polls, who wish solely in these polls to test
3 negatives against their opponents, because at that moment in
4 that campaign that's what they need to do. You know,
5 Leonard Boswell presumably is finding himself in a
6 competitive race in October of 2004 and he's asking himself,
7 you know, how do I beat this guy? What are the arguments
8 that are going to resonate against this guy? He may be
9 asking himself -- I haven't had to go negative for the first
10 22 months of this campaign, but now it's October, I'm not
11 doing as well as I would prefer and/or I may be doing fine,
12 but I may fear that it goes south later, so how do I make
13 sure that I'm ready?

14 And at that moment, he may want to test negatives
15 against his opponent. And to require him, at that point, to
16 test the positives on himself, which he may have already
17 done previously and amply -- or he may feel that he has a
18 good handle on, is something that the regulations shouldn't
19 require him to do.

20 You know, another point to make in response to
21 this is -- I mean this is kind of, I guess, the classic case

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1 of hard cases make good laws, because you could imagine the
2 reverse here. You can imagine Leonard Boswell doing a poll
3 where he's testing the negatives on himself. You know, I'm
4 going to ask you five things about Leonard Boswell and I
5 want to know if it makes you more or less likely to vote for
6 him. You know, he voted for the largest tax increase in
7 history, he fails to be kind to small animals in the street,
8 you know, whatever it is that his pollsters have decided is
9 selling in that election, and do you want to have that
10 communication -- have a disclaimer at the end saying Paid
11 for by Boswell for Congress.

12 I mean imagine, for example, if Obama or McCain
13 were doing that in their own polls at this time of the
14 campaign. Not only would it give an immense untoward
15 strategic advantage to the other side, which would know
16 exactly, you know, what the other candidate is thinking
17 about themselves and perhaps what their blind spots are and
18 where you can exploit them, but it's also -- it also exposes
19 them, frankly, to embarrassment in the press and the public
20 discourse. They want to know how the facts about themselves
21 are going to play with particular voters, but they're not

1 eager to do that, you know, advertising that it's themselves
2 that are doing it.

3 So to sum up, I think, A, the character of the
4 communication should, based on past rules, past experience,
5 be recognizable to the Commissions. I don't think that it
6 should require the sort of anguished contextual judgments
7 that I think some might fear, but also I think the
8 candidates need, as a First Amendment right as much as
9 anything else, to have flexibility in how they're crafting
10 their own polls to determine what they need to learn about
11 and what they don't need to learn about in their own
12 campaigns.

13 MS. DUNCAN: Well, I can imagine a situation where
14 the testing of negatives can happen with respect to the
15 opponent, not with respect to the person financing or doing
16 the calls and that that could have the effect or the
17 consequence of persuading voters or influencing the outcome
18 of the election, maybe not intended, but it would have the
19 consequence.

20 Do you have a view as to whether that kind of
21 situation takes it then out of how you would define a bona

1 fide scientific research poll and put it into then the
2 general advertising category?

3 MR. SVOBODA: I think what Al Quinlan would tell
4 you from his affidavit is that the length of the
5 questionnaire, the nature of the questionnaire, the total
6 number of respondents, the total length of time it takes to
7 create the survey, that all of those are bellwhethers as to
8 whether you have an intent or an effect of influencing voter
9 opinions about a candidate. I think he would tell you that
10 because you're dealing with questionnaires that seek
11 demographic information that are generating cross-tabular
12 results that are being designed for survey research purposes
13 that take 10 minutes to at least -- sometimes many times
14 more than that to distribute -- that those are ample
15 indications of a non-election influencing purpose. At least
16 that discrete communication that you're trying to influence
17 voter activity.

18 MS. DUNCAN: So you'd have to rely on the other
19 factors there?

20 MR. SVOBODA: Correct.

21 MS. DUNCAN: Let me just ask one more question

1 about another one of these criteria that Mr. Quinlan offers
2 as one that distinguishes scientific research polls from
3 general political advertising and that is that the purpose
4 of the data is to effect later strategic decision-making.
5 Let me just ask about that in the context of this particular
6 matter. Is it your position that, in fact, these
7 communications did affect later strategic decision-making?
8 Particularly in light of the timing of the communications,
9 which is relatively close to the election?

10 MR. SVOBODA: I think they did, because candidates
11 on the eve of an election need to figure out what they're
12 going to say. If they find out that they're in trouble,
13 they need to know what they can say negatively about their
14 opponent. And so I think there's no question that the poll
15 introduced information that was useful to the campaign in
16 reaching those judgments, in terms of how effective or how
17 ineffective these particular lines of arguments were. I
18 think particularly in the case of the first poll, which
19 tested multiple negatives, I think it provided the
20 opportunity to distinguish which of those might be effective
21 lines of political argument and which were less so.

1 MS. DUNCAN: Are you speaking generally now or
2 that specifically in this matter there was strategic
3 decision-making based on the results of those calls?

4 MR. SVOBODA: I think in this matter there was
5 strategic decision-making that was based on these calls.

6 MS. DUNCAN: Okay. That's very helpful.

7 MR. SVOBODA: That was --

8 MS. DUNCAN: I'm sorry. Go ahead.

9 MR. SVOBODA: I'm sorry. That was the purpose of
10 doing it.

11 MS. DUNCAN: All right. Thank you.

12 CHAIRMAN MCGAHN: Mr. Vice-chair?

13 VICE-CHAIRMAN WALTHER: Was there particular
14 written instructions given to the polling entity to seek
15 what information you were trying to elicit and then it was
16 left up to them to figure out what kind of questions to ask?
17 How does that work in a case like this where -- I'm having a
18 hard time with some of the questions that were asked,
19 because you can see as to how much scientific evidence is
20 really said to being drawn by those. But in a given case --
21 say in this particular case, what are the specific

1 instructions that were given to elicit, say, we want you to
2 help us find out what negatives would be effective against
3 this candidate? Legitimate negatives.

4 MR. SVOBODA: No, it's much more prosaic than
5 that. What will happen will be you will have a pollster who
6 is a member of the campaign strategic team. They will help
7 make strategic decision-making with the campaign manager,
8 with the media consultant, with the general consultant. The
9 pollster will draft a questionnaire based on, among other
10 things, on their own observations of the race, input that
11 they received from the campaign manager, in particular, with
12 respect to the questions that trouble you, Commissioner,
13 with input that they've received from their research
14 director. So the pollster, who typically is trained in
15 developing these sorts of questionnaires and eliciting data
16 with integrity, where you can rely on the results, will
17 draft the questionnaire, and then the questionnaire will be
18 made available to what's called a call center. In this
19 case, it was Quest, which was located in Canada. There was
20 one other call center, I think it was Opinion Dynamics. And
21 the call center will hire people who are trained --

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1 basically, like trained phone interviewers who will then
2 call the voters and read strictly from the questionnaires.
3 They'll be given clear instructions not to deviate from the
4 questionnaires.

5 These people are -- I mean not to be mean or
6 dehumanizing, but they're like robots. I mean they are
7 delivering the messages that the pollsters want them to
8 convey in as dispassionate a way as possible, so as not to
9 bias or interfere with the integrity of the results. And
10 then the data that's collected by the call center will be
11 provided back to the pollster, who will distill it into what
12 are called top-lines, which is -- you know, each question,
13 the percentage of people who answered each way, and then
14 cross-tabular results so that you can see, based on
15 demographic characteristics, or people who answered on this
16 or that question, how they answered on a particular
17 question. And the pollster will use that as the basis to
18 provide advice to the campaign. What they may do -- I don't
19 believe they did it in this instance, but what will often be
20 the case is they'll draft a strategic memo to the campaign
21 saying here's how I interpret the poll. We have deduced

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1 that Svoboda has deep trouble, you know, winning votes from
2 women between the ages of 40 and 65, he needs to talk more
3 about Social Security, needs to talk more about Medicare,
4 you know, and here are things that you can do.

5 So the pollster will distill this into actionable
6 strategic advice for the campaign.

7 CHAIRMAN MCGAHN: What happens when somebody asks,
8 as I always do if I get a call -- a robo-call -- who is
9 calling me? Why is this call being directed to me? I'm
10 always inquisitive about that. And that helps me decide
11 whether I want to continue or not, I'll be honest with you.
12 So what happens then when somebody asks you? Do you
13 disqualify those that ask you or just say I'm sorry, I'm not
14 allowed to tell you? Or what?

15 MR. SVOBODA: No. In fact, Al Quinlan talks about
16 that in the affidavit. Typically, the call center will
17 either identify themselves or they'll provide, you know, a
18 business name related to the transaction. They won't
19 disclose who the end client is, whether it was, for example,
20 Anzalone List Research or whether it was the Boswell
21 campaign, precisely because that information might buy us

1 the results.

2 So, for example, if I were looking at him in 2004
3 and I got, you know -- well, take an example, I guess, in
4 2004 saying I'm calling from the Mellman Group, will you
5 have time for a 20-minute survey, you know, about the
6 presidential race? Well, I know exactly who they're calling
7 on behalf of, I know they're calling about John Kerry and
8 they're taking a poll for John Kerry. And so if they give
9 me that information, then I'll post that to Free Republic
10 saying, oh, I got the Kerry poll and here's exactly what
11 they asked me. So they'll be nondescript about it. They
12 won't typically lie about it, but they'll be nondescript
13 about it and basically give the name only of the call
14 center.

15 CHAIRMAN MCGAHN: Ms. Weintraub, you're not going
16 to ask about that Canadian outsourcing, are you?

17 COMMISSIONER WEINTRAUB: I'm not. No. I realize
18 that when I was taking Mr. Svoboda through the regs, I
19 should have gone back to one more reg. I just want to make
20 sure that I've got your argument down. Telephone banks,
21 because you said it wasn't a telephone bank. Now, our

1 regulation defines telephone bank as more than 500 telephone
2 calls of an identical or substantially similar nature within
3 any 30 day period. And there's no reference at all to
4 content. So just so I get it in my head, tell me one more
5 time why wasn't it a telephone bank?

6 MR. SVOBODA: Well, first off you take the term
7 itself, which meant something to Congress and political
8 professionals and that was being applied to party committees
9 in the field context and you can argue that the term itself
10 was not meant to capture this sort of conduct.

11 The second is if you look at identical or
12 substantially similar communications and you look at a poll,
13 which is individualized dialogues with respondents where
14 they are all telling you different things, they're all
15 telling you very different things and you're eliciting
16 information from them and aggregating it into a coherent
17 whole, that belies the notion that these are identical or
18 substantially similar communications.

19 COMMISSIONER WEINTRAUB: Okay. Let me interrupt
20 you for one second there, because the regulation goes on to
21 say, for purposes of this section substantially similar

1 includes communication that includes substantially the same
2 template or language, but vary in nonmaterial respects, such
3 as communications customized by the recipient's name,
4 occupation, or geographic location.

5 MR. SVOBODA: But nonmaterial respects,
6 Commissioner. Everything that these voters are telling us
7 is material. It's the whole reason we're communicating with
8 them. Whether they like Barack Obama or John McCain is
9 material, whether they're a 40 year old woman or a 65 year-
10 old man is material. Whether they think that Stan Thompson
11 shouldn't have provided funding to hunt down Osama Bin Laden
12 is material. Everything they're telling us is material and
13 all of these interviews are varying in all of those
14 respects.

15 COMMISSIONER WEINTRAUB: And that changes the
16 questions? Depending on how you answer one question, you
17 get a different set of questions down the road?

18 MR. SVOBODA: In some instances it can, yes.

19 COMMISSIONER WEINTRAUB: In these polls?

20 MR. SVOBODA: But it goes to basically -- it goes,
21 I think, to the basic issue about applying telephone bank to

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1 this particular context, which is the classic case of
2 putting the square peg in the round hole. It was written to
3 effect parties and candidates delivering messages to voters,
4 saying come to the fish fry for Leonard Boswell on Friday
5 night or vote for Leonard Boswell on November 4 or have you
6 heard about Leonard Boswell's plan for Social Security?
7 It's intended to get at basically these sorts of advertising
8 and mobilization communications. It wasn't crafted to get
9 at these sorts of interviews, which were intended to elicit
10 information from voters.

11 So you look, for example, at the word -- I think
12 it's "convey" in the regulation -- I mean you're talking
13 about communications that are meant to convey information
14 and these are communications that aren't meant to convey
15 information, they're meant to elicit information.

16 COMMISSIONER WEINTRAUB: Well, actually -- but it
17 doesn't -- there isn't anything in the reg about conveying
18 information, it just says more than 500 telephone calls of
19 an identical or substantially similar nature within any 30
20 day period. It's not dispositive, because I think you get a
21 better argument on advertising.

1 MR. SVOBODA: Right.

2 COMMISSIONER WEINTRAUB: I just want to make sure
3 that, you now -- because when I read that it seems to me
4 that certainly one could make the argument that our hands
5 are somewhat tied by that, at least insofar as finding that
6 this was a telephone bank, as defined in our regulation.
7 And you say it's not, so I want to make sure you have full
8 opportunity to tell me why it's not.

9 MR. SVOBODA: Let me take another run at this.
10 The Commission's got authority at the end of the day to
11 interpret its own regulations. I mean it takes statutes and
12 it takes rules that it writes and there are times that it
13 has to put meat on the bones, if you will. It says, yes,
14 this is a bare-bones rule and it says this, this, this, and
15 this, but how does it apply in this particular context? At
16 some level what does it mean and what is attempted to cover?
17 So it's not simply an arid, you know, application of
18 particular words to particular conduct. At some level in
19 interpreting and applying the rule you have to take what it
20 was intended to get at and apply it to particular conduct
21 and see, is this what it was meant to cover? And that's

1 where I think there's a problem with applying the telephone
2 bank regulation to scientific polls, because while the
3 regulation itself doesn't say convey, if you read the
4 regulation and look at it, you see that that's exactly what
5 it's about. It's about trying to get at a type of
6 communication where a political party is communicating
7 information to voters. I mean it's implicit in the
8 language.

9 So, for example, you know, you look --
10 communications transmitted. They include substantially same
11 template or language. Why do they say substantially the
12 same template or language? Because they're trying to
13 basically get at mass advertising. You know, if it's like,
14 for example, the episode of The Office where Michael is
15 trying to get, you know --

16 COMMISSIONER WEINTRAUB: I've never seen The
17 Office. I should be embarrassed to admit that, but --

18 MR. SVOBODA: Or somebody who works for a
19 telemarketing firm reading from a script saying would you
20 like to buy prescription drugs. You know this new weight-
21 loss drug or something. I mean that's what telephone bank

1 is intended to get at. Somebody's selling something to
2 someone. It's somebody who is communicating actively with
3 somebody who is listening passively and trying to, you know,
4 get them to do what you want to do.

5 But a poll is exactly the reverse of that. A poll
6 is where you're communicating with someone and you want to
7 know what they think. You're not trying to influence what
8 they're doing, you're trying to know what they think.

9 COMMISSIONER WEINTRAUB: That's very helpful.
10 Thank you.

11 COMMISSIONER BAUERLY: Can I ask one --

12 CHAIRMAN MCGAHN: Sure.

13 COMMISSIONER BAUERLY: So does your answer change
14 if I'm calling and I say, are you coming to the fish fry for
15 Leonard Boswell? It seems to me that if we are only
16 deciding whether something's a phone bank, whether the
17 question is conveying information versus getting
18 information, there's a lot of instances where I think what
19 you're talking about with phone banks, where it's, you know,
20 where you're getting a message out or you're telling someone
21 about a fish fry, it seems to me there's obviously going to

1 be a response from that person. So where do we draw the
2 line if there are responses in both instances?

3 MR. SVOBODA: Well, typically in that case the
4 response is going to be, you know, either one word or three
5 words -- yes, no, or I don't know.

6 COMMISSIONER BAUERLY: Well, there might be, but
7 I'm certain there are also lots of people who once they have
8 someone from the campaign on the phone, might feel free to -
9 - they may ask who's calling? They may ask lots of other
10 questions about issues or things like that, so --

11 MR. SVOBODA: Okay.

12 COMMISSIONER BAUERLY: -- I'm just trying to
13 understand where the line is if a response is also possible
14 in these other circumstances?

15 MR. SVOBODA: I think the basic line is
16 advertising. You know, are you trying to provide people
17 with information that you expect them to act upon? You
18 know, that's what advertising is. That's the dictionary
19 definition. And so telling people, hey, Leonard Boswell is
20 going to be at the fish fry on Friday night, that's
21 advertising. You're telling them that because you want

1 them to keep that information and you want them to act on
2 it.

3 But a poll, in contrast, is not advertising.
4 You're not providing them with information that you are
5 expecting them to act upon, you are eliciting information
6 from them that you act upon. I mean, frankly, most
7 pollsters, as they communicate with respondents in doing the
8 polls, they would actually prefer probably that they forget
9 what they heard from the pollster, precisely so they
10 wouldn't go and post it on the Daily Coast or RedState.org
11 and they can protect the integrity of the data.

12 So I think that's the fundamental distinction,
13 Commissioner. It lies in advertising. Are you trying to
14 give other people information for the purpose of having them
15 act upon it. And it's of a piece with -- by the way, the
16 recent telephone bank was written into the statute and it
17 was for FEC purposes. It was to keep state and local
18 parties from spending soft money to influence federal
19 elections. It was to keep them from using soft money to pay
20 for phone banks to tell people to go and vote for a federal
21 candidate.

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1 COMMISSIONER BAUERLY: And so it's the advertising
2 line where you argue that things like voter ID don't fall
3 into this area?

4 MR. SVOBODA: Correct. Correct.

5 CHAIRMAN MCGAHN: Anything from the office of
6 staff director?

7 MR. STOLTZ: Thank you, no.

8 CHAIRMAN MCGAHN: We're already over time, so I
9 always like to give you the final word and let you give the
10 old college try. Touché.

11 MR. SVOBODA: Well, I appreciate the Commission
12 taking the time and asking all the questions that you did.
13 I think the Commission faces two basic questions: The first
14 is, is this a result that you want to reach? And then
15 second is, if it's not, how do you avoid it?

16 In terms of whether this is a result you want to
17 reach, clearly, no one in the regulated community has any
18 anticipation that the disclaimer requirements apply to
19 scientific polls. And if the Commission were to hold
20 otherwise, it would completely change the way politics is
21 conducted in a way that people aren't anticipating. It

1 would make news, and unwelcome news, to those like my
2 clients that are active politically on both sides of the
3 aisle. How does the Commission avoid that outcome? I think
4 the Commission has the flexibility and indeed is required to
5 read its regulations in a way that does not apply to these
6 communications. I think that the Commission can find that
7 110.11, at bottom, applies only to advertising and that a
8 scientific poll, by its nature, is not a form of
9 advertising.

10 I think the Commission can also find that 110.11,
11 by its definition, reaches only telephone banks as a form of
12 public communication and can find that this is not a
13 telephone bank. That it was not the sort of thing that
14 Congress wrote the statute -- a statute, by the way, written
15 in a completely different area of the law having nothing to
16 do with disclaimers -- to reach.

17 How do you find that it's not a telephone bank?
18 As I was talking about with Commissioner Weintraub, I think
19 you can look, A, at the way in which that term is understood
20 in the political community, and B, you can link it again to
21 the basic concept of advertising. That what Congress was

1 trying to do with the FEA restrictions was to make clear
2 that you couldn't disseminate information to people spending
3 soft money in ways that would affect the outcome of the
4 election. And that's in stark contrast from what we're
5 talking about here, which is trying to elicit information
6 from people in a neutral way that you can then process and
7 use for your own strategic decision-making.

8 So those, I think, are the paths that the
9 Commission can follow to reach a proper outcome in this
10 case. And I appreciate the Commission's time and we look
11 forward to providing whatever other information you or the
12 general counsel might require.

13 CHAIRMAN MCGAHN: Thank you. Anything else for
14 the good of the order? If not, the meeting is hereby
15 adjourned. Thank you.

16 (Whereupon, at 11:34 a.m. the hearing was
17 concluded.)

18
19 CERTIFICATE OF REPORTER

20
21 I, PATRICIA A. EDWARDS, the officer before whom the
22 foregoing testimony was taken, do hereby testify that the

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1 testimony that appears in the foregoing transcript was duly
2 recorded by me; that the testimony was taken by me and
3 thereafter reduced to a transcript under my direction; that
4 said transcript is a true record of the testimony given by
5 the witnesses; that I am neither counsel for, nor related
6 to, nor employed by any of the parties to the action in
7 which this testimony was taken; and further, that I am not a
8 relative or employee of any attorney or counsel employed by
9 the parties hereto nor financially or otherwise interested
10 in the outcome of the action.

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